

# EDITOR'S NOTE

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NO. 118 Original TITLE United States, Plaintiff  
v.  
Alaska

## DOCKETED

January 7, 1991

## COURT -

Motion for leave to file Bill of Complaint

## DATE

## PROCEEDINGS AND ORDERS

Counsel for plaintiff: Solicitor General

Counsel for defendant:

January 7, 1991

Motion for leave to file Bill of Complaint filed.

March 13, 1991

DISTRIBUTED. March 29, 1991.

April 1, 1991

Motion for leave to file Bill of Complaint is GRANTED. The defendant is allowed sixty days within which to file an answer.

March 14, 1991

Memorandum of Alaska filed.

May 31, 1991

Answer filed by the State of Alaska.

June 4, 1991

DISTRIBUTED. June 20, 1991.

June 24, 1991

DISTRIBUTED. June 27, 1991.

June 28, 1991

It has been suggested that the United States and Alaska are in agreement on the facts relevant to a decision in this action. If this is the case, the parties are invited to file a stipulation of facts in this Court on or before 60 days from the date of this order.

If such stipulation is not timely filed, a Special Master will be appointed and the case will proceed in the usual manner.

If such a stipulation is filed, the parties shall brief the legal issues. The brief of the United States shall be filed no later than 45 days after the filing of the stipulation of facts. Alaska's brief shall be filed within 30 days thereafter, after which the United States may promptly file a reply brief. The case will then be orally argued.

September 6, 1991

Joint Stipulation of Facts Filed.

August 30, 1991

Extension of time to file joint stipulation of facts granted to and including 9/6/91.

Sept. 24, 1991

Application for an extension of time within which to file a motion for summary judgment denied by Justice O'Connor.

Sept. 13, 1991

The motion of Alaska for modification of briefing schedule set by order of Court on June 28, 1991 is granted and it is ordered that briefs in support of cross motions for summary judgment may be filed within forty-five days of Sept. 6, 1991, with reply briefs, if any, to be filed within thirty days of the filing of the opening briefs.

*Title*

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 21, 1991	— Motion for summary judgment filed by Alaska.
Oct. 21, 1991	3 — Brief in support of motion for summary judgment filed by United States.
Oct. 21, 1991	— Motion of Alabama, et al. for leave to file a brief as amici curiae filed
Nov. 13, 1991	Lodging of permits and disclaimers by U.S. filed
Nov. 20, 1991	<i>24</i> <del>Opposition to summary judgment by U.S. filed</del> <i>of Alaska</i>
Dec. 16, 1991	Motion of Alabama, et al. for leave to file a brief as amici curiae is granted. The cross-motions for summary judgment are set for oral argument in due course.
Feb. 24, 1992	ARGUED.



118

No. , Original

Supreme Court, U.S.  
F I L E D

JAN 7 1991

**In the Supreme Court of the United States**

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

**MOTION FOR LEAVE TO FILE COMPLAINT,  
COMPLAINT, AND BRIEF IN SUPPORT OF MOTION**

KENNETH W. STARR

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1990

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No. \_\_\_\_\_, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

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## **MOTION FOR LEAVE TO FILE COMPLAINT**

---

The United States of America, by its Solicitor General, asks leave of the Court to file its complaint against the State of Alaska submitted herewith.

Respectfully submitted,

KENNETH W. STARR  
*Solicitor General*

# **In the Supreme Court of the United States**

OCTOBER TERM, 1990

---

No. \_\_\_\_\_, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

---

## **COMPLAINT**

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The United States of America, by its Solicitor General, brings this suit against the defendant, the State of Alaska, and for its cause of action states:

### **I**

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, United States Code, Section 1251(b)(2).

### **II**

This dispute involves submerged lands in Norton Sound, Alaska, off the coast of Nome, Alaska. By Sections 2 and 3 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1332, and by Section 9 of the Submerged Lands Act, 43 U.S.C. 1302, the United States has at all times relevant herein retained exclusive possession and control of all submerged lands, and all resources lying under those lands, seaward of three geographical miles from the State of Alaska's coast line as defined in the



Submerged Lands Act, 43 U.S.C. 1301(c): "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea."

### III

By Section 3 of the Submerged Lands Act, 43 U.S.C. 1311, and Section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 343, the United States granted to the State of Alaska title to and ownership of submerged lands, and resources lying under those lands, coastward of the three-mile limit.

### IV

Under the decisions of this Court in *United States v. Louisiana*, 394 U.S. 11 (1969), and *United States v. California*, 381 U.S. 139 (1965), certain artificial additions to the natural shore, such as jetties, become part of the coast line and must be taken into account in determining the location of the three-mile limit and the extent of the territorial sea.

### V

Pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, the United States, through its Secretary of the Army and its Army Corps of Engineers, must examine and approve any artificial additions to the coastline, including the structures listed in Paragraph IV, that will occupy navigable waters, before such structures may be built. In making their determination, the Secretary of the Army and the Corps of Engineers consider, among other things, the effect on the offshore property interests of the United States of a proposed artificial addition.

## **VI**

In 1982, the City of Nome, Alaska, applied to the Army Corps of Engineers for a permit to construct a new port facility that would extend into Norton Sound, a navigable waterway containing submerged lands that are under the exclusive possession and control of the United States or owned by the State of Alaska as described in Paragraphs II and III.

## **VII**

The Army Corps of Engineers, in consultation with the United States Department of the Interior, see 33 C.F.R. 320.4(f), concluded that the proposed Nome facility would extend the coastline of the State of Alaska as described in Paragraph IV, adversely affecting the property interests of the United States in submerged lands in Norton Sound; the Corps therefore requested the State of Alaska to waive any property rights it might obtain over submerged lands, otherwise subject to exclusive federal possession and control, as a result of the City of Nome's construction of the facility.

## **VIII**

The State of Alaska agreed to and executed the waiver, which is valid and binding and forfeited any claim the State of Alaska may otherwise have had over any submerged lands beyond three miles from the natural coastline. The City of Nome then built the harborworks.

## **IX**

The United States now wishes to lease portions of the outer continental shelf in Norton Sound for the purpose of mineral recovery. The State of Alaska has asserted that

it owns more than 1000 acres of the proposed lease site as a result of the extension of its coastline caused by the Nome facility, notwithstanding its execution of the waiver described in Paragraphs VII and VIII, and it has requested the United States to delete the disputed area from the lease sale.

**X**

The existence of this claim by the State of Alaska casts a cloud on the rights of the United States and interferes with the effective development of the natural resources of the affected area, and thereby causes the United States great and irreparable injury for which it has no adequate remedy at law.

WHEREFORE, the United States prays:


1. That the State of Alaska be required to file an answer specifying the extent and nature of its claims in or to the submerged lands described in Paragraph IX.

2. That the Court enter a decree declaring that the submerged lands of the Outer Continental Shelf described in Paragraph IX appertain to the United States and are subject to its exclusive jurisdiction and control, and that the State of Alaska has no title thereto or interest therein.

3. For such other and further relief as the Court may deem proper.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*





# **In the Supreme Court of the United States**

OCTOBER TERM, 1990

---

No. \_\_\_\_\_, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

---

## **BRIEF IN SUPPORT OF MOTION**

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### **JURISDICTION**

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, United States Code, Section 1251(b)(2).

### **STATEMENT**

This is an action to quiet title to submerged lands in Norton Sound, Alaska, and to establish, as against the State of Alaska, the exclusive rights of the United States in those lands beginning at a line three geographical miles seaward of the ordinary low-water mark of the natural coast of Alaska.

In *United States v. California*, 332 U.S. 19 (1947), this Court held that the federal government, and not the States, had paramount rights in all lands, including underlying mineral resources, beneath the marginal sea.<sup>1</sup>

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<sup>1</sup> At that time, the term "marginal sea" referred to the belt of waters three miles seaward of the coastline. See *United States v. California*, 332 U.S. at 29-34 (1947). Submerged lands beyond three miles are called the "outer Continental Shelf." See 43 U.S.C. 1331(a).



Thereafter, in the Submerged Lands Act, ch. 65, 67 Stat. 29, 43 U.S.C. 1301-1315, Congress granted to the States ownership of those submerged lands from the coastline to a point, in most cases, three geographical miles seaward thereof. Beyond that point, the United States retained full possession and control of all submerged lands. See 43 U.S.C. 1332.<sup>2</sup>

Although the Submerged Lands Act defines a State's coast line as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," 43 U.S.C. 1301(c), artificial additions to the coast, such as jetties and other structures, may become part of the coast line when they have a low water mark.<sup>3</sup> Such structures therefore have the effect of extending the three-mile limit seaward, by the distance that the structure protrudes beyond the natural low water line. See *United States v. Louisiana*, 394 U.S. 11 (1969); *United States v. California*, 381 U.S. 139 (1965). What was once federal submerged land may become state land by virtue of the addition.

This Court has stated that the United States may "protect itself" from such artificial changes in the coastline and consequent encroachment upon its submerged lands "through its power over navigable waters." *United States v. California*, 381 U.S. at 177; see *United States v. Louisiana*, 394 U.S. at 41 n.48 ("If the United States is con-

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<sup>2</sup> The Submerged Lands Act was made applicable to Alaska upon its admission to the Union in the Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343.

<sup>3</sup> Thus, a "spoil bank," which is attached to the natural coast line and has a continuous low-water line, is an extension of the mainland, see *United States v. Louisiana*, 394 U.S. 11, 40-41 n.48 (1969), while an open work pier, which does not have a low water mark, is not, see *United States v. California*, 447 U.S. 1, 6 (1980).

cerned about \* \* \* extensions of the shore, it has the means to prevent or remove them.”). The United States requires that plans for artificial additions to the coastline be submitted to the Secretary of the Army, who through the Army Corps of Engineers must examine and approve them. See Rivers and Harbors Appropriation Act of 1899, ch. 425 § 10, 30 Stat. 1151, 33 U.S.C. 403. In making his determination, the Secretary considers “the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” 33 C.F.R. 320.4(a). Among the factors that the Secretary and the Corps of Engineers take into account is the effect an addition to a State’s coastline will have on the offshore property interests of the United States. 33 C.F.R. 320.4(f).

In 1982, the City of Nome, Alaska, applied to the Army Corps of Engineers for a permit to construct a new port facility that would extend into Norton Sound, a navigable waterway containing submerged lands that are controlled by the United States and lands that are owned by the State of Alaska as described above. The Corps, in consultation with the United States Department of the Interior, concluded that the proposed Nome facility would extend the coastline of the State of Alaska, to the detriment of the offshore property interests of the United States. The Corps therefore requested the State of Alaska to waive any property rights it might obtain over submerged lands, otherwise controlled by the United States, by the City of Nome’s construction of the facility. The State executed the waiver and forfeited any claim the State of Alaska might otherwise have acquired. See App., *infra*, 1a-4a.

The waiver, entitled a “disclaimer,” includes a provision expressing the State’s disagreement with the United States “as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing \* \* \* a [construction] permit” (App., *infra*,

2a), and reserving the State's "right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line." (App., *infra*, 4a).

The United States now wishes to lease portions of the submerged lands in Norton Sound for the purpose of mineral recovery and has proposed a February 1991 lease sale. See 55 Fed. Reg. 24,330 (1990). The State of Alaska has claimed that more than 1000 acres of the proposed lease site belong to it, by virtue of the extension of the coastline caused by the Nome facility, despite the State's disclaimer of those rights, and it has requested the United States to delete that area from the proposed lease sale. The United States therefore brings this action to remove the cloud on its title to the lands in question and seeks a declaration that the State of Alaska's waiver was valid and binding upon it, and that the United States retains full dominion over all lands more than three miles seaward of the natural coastline off Nome, Alaska.

## ARGUMENT

### A. THE COMPLAINT STATES FACTS ENTITLING THE UNITED STATES TO RELIEF

This Court has recognized that the United States, not the individual States, exercises dominion over all lands beneath the marginal sea. See *United States v. California*, 381 U.S. 139 (1965). By the Submerged Lands Act, ch. 65, 67 Stat. 29, 43 U.S.C. 1301-1315, the United States has given the States ownership of a three-mile wide strip of land along the coast. But, at the same time, the United States reserved to itself its "plenary power to exclude structures from navigable waters." *United States v. Appalachian Power Co.*, 311 U.S. 377, 424 (1940). See Sub-

merged Lands Act § 3(d), 43 U.S.C. 1311(d) (the grant of submerged land to the States does not impair the United States' control over navigable waters).

This Court has ruled that artificial additions to a State's coastline may extend that State's ownership of submerged lands more than three miles from the natural coast. See *United States v. Louisiana*, 394 U.S. 11 (1969); *United States v. California*, 381 U.S. 139 (1965). However, in those very cases the Court stated that the United States may use its plenary power to control navigable waterways to protect itself from losing dominion over submerged lands beyond three miles from the coast through artificial additions, and it has suggested that changes in the boundary "could thus be the subject of agreement between the parties." *United States v. California*, 381 U.S. at 176, 177; see *United States v. Louisiana*, 394 U.S. at 41 n.48. The United States so used that power in this case by conditionally approving the Nome harborworks. By challenging the exercise of this power, the State of Alaska has created a dispute that requires adjudication by this Court.

The United States seeks to secure a declaration quieting title to disputed lands lying more than three miles seaward from the natural coastline of Alaska. Such a decree can be entered with a minimum of delay. The only question presented is whether the United States may request a State to waive its rights under the Submerged Lands Act as part of its general public interest review process for proposed structures in navigable waters. We believe that the parties can stipulate to the facts; thus, the taking of evidence will not be required and resolution of the controversy will present only questions of law. As in *United States v. California*, 332 U.S. 19, 24 (1947), and in *United States v. California*, 436 U.S. 32 (1978), there is no need for the appointment of a special master; this Court may proceed on a stipulated record and briefs.

**B. THIS IS AN APPROPRIATE CASE FOR EXERCISE OF  
THE ORIGINAL JURISDICTION OF THIS COURT**

This case eminently warrants invoking the original jurisdiction of this Court. The dispute is of vital importance and is not of merely local or transitory significance. Its outcome will affect not only the State of Alaska but all 23 States that border the open sea, several of which have signed disclaimers similar to the one here at issue. The ongoing controversy interferes with the congressionally declared national policy of "expeditious and orderly development" of the outer Continental Shelf, a "vital national resource reserve."<sup>4</sup> See 43 U.S.C. 1332(3). The present uncertainty casts a cloud on coastal boundaries, affects coastal leasing revenues, and impairs the ability of federal and state governments to put resources lying beneath submerged lands to their best uses. In short, the issue has recurring impact on federal-state boundaries in an area where there is a manifest need for certainty.

Because the issue is purely one of law, and no facts need to be developed, no useful purpose would be served by going first to district court. Indeed, trial court proceedings, followed by appellate review, would needlessly cause uncertainty and delay in resolving the issue. Since the issue has recurring importance to the Nation and almost half its States, this Court will almost certainly need to decide the matter at some point. There is no reason to wait.

The issues presented in this case are akin to those presented in other submerged lands disputes, such as *United States v. Louisiana, supra*, and the currently

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<sup>4</sup> While the suit is pending, the resource recovery lease could proceed as planned, with proceeds from the disputed lands being placed in an escrow account payable to the prevailing party. See Section 7 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1336.



pending original action in *United States v. Alaska*, No. 84 Orig. (1979 Term). Indeed, to our knowledge, with only one exception, all disputes between the United States and the States concerning ownership of submerged lands have been resolved by original actions in this Court,<sup>5</sup> which has considerable expertise in the area. The issues here are similar in urgency and importance to those in all the other cases. The considerations that led this Court to take jurisdiction of those cases as original suits are fully applicable here.

### CONCLUSION

The motion for leave to file the complaint should be granted.

Respectfully submitted,

KENNETH W. STARR

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JANUARY 1991

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<sup>5</sup> The one exception was *United States v. Alaska*, 422 U.S. 184 (1975), in which this Court expressed its desire to know "why the United States chose not to bring an original action in this Court." *Id.* at 186 n.2.



## **APPENDIX**

### **DISCLAIMER**

WHEREAS, the City of Nome ("Nome") has applied to the United States Army Corps of Engineers for a permit to construct a port facility at Nome;

WHEREAS, the project for which Nome is seeking the Corps of Engineers permit is fundamental to economic development in Northwestern Alaska;

WHEREAS, both statewide and nationwide benefits will be derived from the proposed Nome port facility through increased employment, increased revenues generated, and enhanced economic opportunities in Northwestern Alaska and the adjacent outer continental shelf;

WHEREAS, under the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., construction of such facility might affect the location of the coast line and boundary of the State of Alaska, including the offshore boundary between the outer continental shelf and state-owned lands beneath navigable water;

WHEREAS, under 33 C.F.R. § 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of the Interior if a project for which a permit is sought might affect the coast line;

WHEREAS, the Corps of Engineers has consulted the Attorney General and the Solicitor pursuant to 33 C.F.R. § 320.4(f);

WHEREAS, the Corps of Engineers has been requested by the Attorney General and the Solicitor to withhold approval of Nome's permit application because of the potential effect on Alaska's coast line;

WHEREAS, the Corps of Engineers has determined that it will not issue such a permit over the Attorney General's and the Solicitor's objections on this ground;

WHEREAS, the Attorney General's and the Solicitor's objections to the permit application on this ground would be removed if a binding disclaimer is entered by the State of Alaska to the effect that Alaska does not, and will not, treat the facility as extending its coast line for purposes of the Submerged Lands Act;

WHEREAS, the Alaska Attorney General, in a formal opinion dated October 29, 1980, concluded that the Alaska Commissioner of Natural Resources has the power to issue such a disclaimer;

WHEREAS, Alaska would enter such a disclaimer without objection if the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska and the United States disagree as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska would not enter such a disclaimer but for the Corps of Engineers' determination that it will not issue the permit unless such a disclaimer is entered, thereby removing the Attorney General's and the Solicitor's objections to issuance of the permit;

WHEREAS, it is neither in the United States's interest nor in Alaska's interest to delay construction of the Nome port facility while the question of the Corps of Engineers' legal authority to require such a disclaimer is resolved;

WHEREAS, this disclaimer is entered without prejudice to Alaska's right to file an appropriate action to determine whether the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit;

WHEREAS, this disclaimer is fully effective and binding upon the State of Alaska, but becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction that the Corps of Engi-

neers does not have the legal authority to require such a disclaimer prior to issuing such a permit; and

WHEREAS, it is the intent of both the United States and Alaska that this disclaimer remove the Attorney General's and the Solicitor's objections to issuance of the permit for construction of the Nome port facility, thereby allowing the construction to proceed, while at the same time preserving both the United States' legitimate interest i[n] not having Alaska's coast line extended if the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit and Alaska's interest in not being bound by such a disclaimer if the Corps of Engineers does not have such legal authority;

THEREFORE, the State of Alaska, acting by and through the Commissioner of Natural Resources, pursuant to the authority granted to the commissioner by art. VIII, sec. 1 of the Alaska Constitution, AS 38.05.020(b), AS 38.05.027(a), AS 38.05.035(a)(14), and AS 38.05.0315(a), declares and agrees as follows:

1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Attorney General and maintains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is



not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coast line, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. This disclaimer is entered without prejudice to Alaska's right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

4. This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

DATED:  
May 9, 1984

STATE OF ALASKA

/s/ ESTHER C. WUNNICKE

Esther Wunnicke, Commissioner  
Department of Natural Resources

(2)  
No. 118 Original

Supreme Court, U.S.  
**E I L E D**  
**MAR 14-1991**  
OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

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UNITED STATES OF AMERICA,

*Plaintiff*

v.

STATE OF ALASKA,

*Defendant*

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On Motion For Leave To File Bill Of Complaint

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**MEMORANDUM OF STATE OF ALASKA**

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No. 118 Original

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In The  
**Supreme Court of the United States**  
October Term, 1990

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UNITED STATES OF AMERICA,  
*Plaintiff*  
v.

STATE OF ALASKA,  
*Defendant*

---

On Motion For Leave To File Bill Of Complaint

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**MEMORANDUM OF STATE OF ALASKA**

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**STATEMENT**

This memorandum is submitted in response to a motion by the United States for leave to file an original bill of complaint against the State of Alaska. The question presented is whether the United States Army Corps of Engineers can require, as a pre-condition to issuing a permit to a third party to construct an artificial structure offshore, that the State in which the structure will be located waive its right to submerged lands to which it otherwise would be entitled under the Submerged Lands Act of 1953, 43 U.S.C. 1301-1315. Alaska does not oppose the United States' motion.



In the Submerged Lands Act, Congress granted to the coastal States ownership of the submerged lands within their boundaries, 43 U.S.C. 1311(a) and (b), which generally speaking are three geographical miles from the "coast line." 43 U.S.C. 1301(b) and 1312; see *United States v. Louisiana*, 363 U.S. 1, 20-25 (1960).<sup>1</sup> The "coast line" is defined in pertinent part as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea." 43 U.S.C. 1301(c). Artificial structures with a low water mark ordinarily extend a State's coastline<sup>2</sup> for Submerged Lands Act purposes. See, e.g., *United States v. California*, 432 U.S. 40, 41-42 (1977); cf. *United States v. Louisiana*, 389 U.S. 155, 158 (1967) ("artificial jetties are a part of the coastline for measurement purposes"); compare *United States v. California*, 447 U.S. 1 (1980) (open-piling piers do not extend the coastline).

Corps of Engineers' approval for such a structure is required by sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 and 403. In deciding whether to approve such a project, the Corps of Engineers considers "the probable impacts, including cumulative impacts, of the proposed activity and its

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<sup>1</sup> The grants to Texas and Florida (along its Gulf coast) extend to nine geographical miles. *United States v. Louisiana*, 363 U.S. at 64 (Texas); *United States v. Florida*, 363 U.S. 121 (1960).

<sup>2</sup> Although the Submerged Lands Act uses the two words "coast line," this Court has consistently used the single word "coastline." E.g., *United States v. California*, 381 U.S. 139 (1965) (*passim*). We employ the Court's usage in this memorandum.

intended use on the public interest." 33 C.F.R. 320.4(a)(1) (1990) (in part). Where a proposed project may extend the coastline for Submerged Lands Act purposes, "coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken." 33 C.F.R. 320.4(f) (1990) (in part).

In 1982, the City of Nome (an independent municipality incorporated in 1901, well before Alaska was admitted to the Union in 1959) applied for a Corps of Engineers permit to construct a new solid fill causeway that would have extended Alaska's coastline for Submerged Lands Act purposes. As a consequence of the required "coordination with the Attorney General and the Solicitor of the Department of the Interior,"<sup>3</sup> Alaska was informed by the Solicitor that the City of Nome's application would not be granted unless Alaska waived any Submerged Lands Act claims that it might make following construction of the causeway.<sup>4</sup>

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<sup>3</sup> Under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1356, the Department of the Interior administers the federal outer continental shelf, which lies immediately seaward of the lands granted to the States under the Submerged Lands Act. See 43 U.S.C. 1331(a) and (b) and 1334.

<sup>4</sup> Alaska was admitted to the Union on January 3, 1959, Presidential Proclamation 3269 (January 3, 1959), 24 Fed. Reg. 81 (1959), six years after the Submerged Lands Act was enacted. The Submerged Lands Act was made applicable to Alaska in section 6(m) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958). See 42 U.S.C. note preceding section 21.

On May 9, 1984, Alaska filed with the Corps of Engineers a disclaimer<sup>5</sup> in which it (1) waived such potential claims, but (2) specified that "[t]his disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coastline."<sup>6</sup>

This is such an "appropriate action." Resolution of the case will determine whether Alaska or the United States owns certain submerged lands in Norton Sound on Alaska's west coast. It also will resolve whether the Corps of Engineers has the legal authority to condition the granting of permits to third parties on waivers by the States of statutory entitlements.

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<sup>5</sup> The disclaimer is reprinted as the Appendix to the United States' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion.

<sup>6</sup> See United States' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion, Appendix at 4a. Alaska first questioned the Corps of Engineers' authority to demand such waivers in 1980. See 1980 Inf. Op. Atty Gen. (Oct. 30; file no. J-66-477-80).

## ARGUMENT

### A. THE UNITED STATES' PROPOSED COMPLAINT PRESENTS A CASE OR CONTROVERSY.

The United States devotes a substantial portion of its Brief in Support of Motion to argument on the merits of the case, contending in effect that this Court has already approved the practice followed by the Corps of Engineers.<sup>7</sup> That argument is premature – after all, leave to file the complaint has not yet been granted – and is irrelevant to the motion before the Court.

The United States having opened the door, however, Alaska is constrained to respond briefly. In doing so at this early stage, it will at least be clear that the United States' proposed complaint, when answered by Alaska, will present a true case or controversy worthy, in the opinion of both the United States and Alaska, of this Court's original jurisdiction.

Alaska does not question that the United States has constitutional authority to prevent States from unilaterally extending their coastlines and their Submerged Lands Act grants "through its power over navigable waters." *United States v. California*, 381 U.S. 139, 177 (1965). Indeed, Congress expressly reserved that Commerce Clause power<sup>8</sup> in the Submerged Lands Act. 43 U.S.C. 1314(a).

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<sup>7</sup> United States' Brief in Support of Motion at 2-5.

<sup>8</sup> United States Constitution, art. I, § 8, cl. 3; see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

But it is one thing to say that the United States has constitutional authority to do something, and quite another to say that Congress has both exercised that authority and delegated it to the federal executive, as the United States claims here. Nothing in the Rivers and Harbors Appropriation Act expressly authorizes the Corps of Engineers to condition the granting of a third-party permit on a waiver by a State of its statutory rights under the Submerged Lands Act. The former Act "was obviously intended to prevent obstructions in the Nation's waterways." *Wyandotte Co. v. United States*, 389 U.S. 191, 201 (1967).

And it is unlikely that Congress would have authorized the Corps of Engineers to condition the granting of a permit under that Act on resolution of a title dispute over which the third-party applicant has no control. Such a practice is patently unfair to the third-party applicant. By requiring such a waiver as a condition precedent to granting a permit, the Corps of Engineers effectively holds the innocent third-party applicant hostage in a controversy between the State and the federal government.

The Corps of Engineers, in its own regulations implementing its Rivers and Harbors Appropriation Act authority, acknowledges that disputes over land title are not properly considered as part of the public interest review process: "The dispute over property ownership will not be a factor in the Corps public interest decision." 33 C.F.R. 320.4(g)(6) (1990) (in part). Although apparently directed at situations where there is a dispute over title to the land that will actually be used for a project, that regulation by its terms requires the Corps of Engineers to



disregard any dispute over land title when making its public interest determination. Absent a waiver by the State, however, the existence of the title dispute between the State and the federal government leads to denial of the third party's application for reasons wholly unrelated to the purpose of the Rivers and Harbors Appropriation Act, protection of navigation.

Most significantly, if the Corps of Engineers succeeds in obtaining a State waiver of Submerged Lands Act claims by withholding approval of a third party's permit application, two separate coastlines are established, one for Submerged Lands Act purposes and a different one for purposes of the United States' international relations. That result, however, is a legal impossibility. Under the Act, as interpreted by this Court, the coastline for Submerged Lands Act purposes is the same as the coastline for purposes of the United States' international relations.

In *United States v. California*, 381 U.S. at 165, this Court incorporated the definitions of the Convention on the Territorial Sea and Contiguous Zone, T.I.A.S. 5639, 15 U.S.T. (Pt. 2) 1606 (1958), into the Submerged Lands Act. As the Court explained, "[t]his establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations, (barring an unexpected change in the rules established by the Convention)." *Id.* Neither the Corps of Engineers nor a coastal State, by agreement or otherwise,<sup>9</sup> can

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<sup>9</sup> In the *California* case, the Court noted that "the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from

effectively amend the Submerged Lands Act to produce two coastlines, one for international relations and a different one for Submerged Lands Act purposes.<sup>10</sup> Only Congress has that power. Yet two coastlines is precisely

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(Continued from previous page)

encroachment by unwarranted artificial structures, and that the effect of any future changes [to the coast line as a consequence of such a structure] could thus be the subject of agreement between the parties." 381 U.S. at 176. The Special Master's Report in that case was filed, however, in November of 1952, 344 U.S. 872 (1952), six months before the Submerged Lands Act was enacted in 1953 and long before this Court incorporated the Convention's definitions into the Act in the 1965 *California* case. As a purely legal matter, the issue now is governed by the Submerged Lands Act and the Convention, any "agreement" between the parties notwithstanding.

In any event, no such "agreement" was reached here. In fact, quite the opposite is true. Alaska's disclaimer expressly stated that Alaska believed the Corps of Engineers did not have the authority to require a waiver, and that the disclaimer would not have been executed but for the Corps of Engineers' refusal to grant a permit to the City of Nome in the absence of a waiver. See United States' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion, Appendix at 2a.

<sup>10</sup> This does not preclude a State from arguing, as Alaska argues in *United States v. Alaska*, No. 84, Original, 442 U.S. 937 (1979) (leave to file complaint granted), that the coastline now asserted by the United States in its international relations is not the coastline which the United States asserted at the time the Submerged Lands Act grant vested in the State. Cf. *United States v. Louisiana*, 394 U.S. 11, 73-74 n.97 (1969) (Louisiana not precluded from arguing that earlier United States' policy for delimiting coastline for international relations purposes controlled delimitation of coastline for Submerged Lands Act purposes).



what the Corps of Engineers seeks to accomplish, without Congressional authority under either the River and Harbors Appropriation Act or the Submerged Lands Act, through the waiver policy at issue here.

In short, the United States' proposed complaint, when answered by Alaska, will present a true case or controversy. As we now show, that case or controversy is an appropriate one for resolution under this Court's original jurisdiction.

**B. THIS IS AN APPROPRIATE CASE FOR EXERCISE OF THE ORIGINAL JURISDICTION OF THIS COURT.**

Alaska recognizes that this Court exercises its original jurisdiction "sparingly" and is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim."<sup>11</sup> Alaska nonetheless agrees with the United States that this is an appropriate case for the exercise of this Court's original jurisdiction.<sup>12</sup>

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<sup>11</sup> *United States v. Nevada*, 412 U.S. 534, 538 (1973). There is no question that another adequate forum exists: Alaska could invoke district court jurisdiction under 28 U.S.C. 1331(a), 1346(f), and 2409a; the United States could file in the district court under 28 U.S.C. 1331(a) and 1346.

<sup>12</sup> United States Brief in Support of Motion at 6-7.

At the outset, this Court has original jurisdiction over the subject matter of the dispute, and is the most appropriate forum for its resolution: "coastal boundary disputes are appropriately brought as original actions in this Court."<sup>13</sup>

In addition, the existence of the dispute between Alaska and the United States currently precludes exploration and development of what may be significant mineral deposits in the area, which is contrary to congressional policy if the lands belong to the United States.<sup>14</sup> Granting the United States' motion for leave to file a complaint will permit Alaska and the United States to enter into an interim agreement for immediate leasing of the disputed lands under their respective statutory authorities.<sup>15</sup>

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<sup>13</sup> *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 277 n.6 (1982). As the United States points out in its Brief in Support of Motion at 7, all but one of the disputes between a State and the United States over ownership of submerged lands have been resolved by original actions in this Court. The exception was *United States v. Alaska*, 422 U.S. 184 (1975), where the Court stated that "[w]e are not enlightened why the United States chose not to bring an original action in this Court." *Id.* at 186 n.2.

<sup>14</sup> Congress has declared that "expeditious and orderly development" of the federal Outer Continental Shelf is a national policy. 43 U.S.C. 1332(3).

<sup>15</sup> Alaska Statute 38.05.137; 43 U.S.C. 1336. Alaska and the United States entered into such an agreement with respect to disputed lands at issue in No. 84, Original. That case is still pending before a special master.

But the action has much broader implications than merely determining Alaska's and the United States' rights to certain lands. The Corps of Engineers' policy of demanding a State waiver before authorizing a third party to construct a project which would extend the coastline is nationwide in scope. It puts all third parties proposing such projects at risk of becoming unwilling victims of the proprietary battles between the States and the federal government. It affects all 23 coastal States equally.

More importantly, the practice has the potential to thwart the congressionally declared national policy "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."<sup>16</sup> Many projects now subject to the State waiver requirement are designed specifically to preserve and protect erodible beaches<sup>17</sup> or to protect and make safe the entrances to harbors.<sup>18</sup> Similar projects, and others like the City of Nome port facilities here, may not be built in the future as a consequence of the Corps of Engineers' policy since a failure by a State to waive its claims precludes construction of the project.

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<sup>16</sup> 16 U.S.C. 1452(1).

<sup>17</sup> E.g., the groins listed in the Second Supplemental Decree in *United States v. California*, 432 U.S. at 41-42.

<sup>18</sup> E.g., the jetties and breakwaters listed in *United States v. California*, 432 U.S. at 41-42, and the two jetties noted in *Texas v. Louisiana*, 426 U.S. 465, 469 n.3 (1976).

Most significantly, the Corps of Engineers' policy of demanding State waivers conflicts with this Court's incorporation of international law principles into the Submerged Lands Act to ensure that there is a single coastline for purposes of both that Act and the United States' international relations.

For all of these reasons, Alaska believes that this Court must resolve the question of the Corps of Engineers' authority to require a State to waive any Submerged Lands Act claim it might make before the Corps will issue a permit to a third party for construction of an offshore artificial structure that would have the effect of extending the coastline. The United States' motion for leave to file an original bill of complaint should accordingly be granted.



### CONCLUSION

For the reasons stated above, Alaska respectfully requests that this Court grant the United States' motion for leave to file the complaint, that Alaska be permitted to answer, and that this Court direct further proceedings as appropriate.<sup>19</sup>

DATED: March, 1991.

Respectfully submitted,

CHARLES E. COLE  
Attorney General

G. THOMAS KOESTER (*Counsel of Record*)  
Assistant Attorney General

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<sup>19</sup> Alaska agrees with the United States that "the issue is purely one of law," United States' Brief in Support of Motion at 6, and that trial court proceedings either in the district court or before a special master are not required. *Compare California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982): "No essential facts being in dispute, a special master was not appointed and the case was briefed and argued."

MAY 31 1991

OFFICE OF THE CLERK

No. 118 Original

In The  
Supreme Court of the United States  
October Term, 1990

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF ALASKA,

*Defendant.*

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ANSWER

---

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No. 118 Original

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In The  
**Supreme Court of the United States**  
October Term, 1990

---

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF ALASKA,

*Defendant.*

---

**ANSWER**

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Defendant State of Alaska, for and as its Answer to plaintiff United States of America's Complaint, admits, denies, and alleges as follows:

I

The allegations of paragraph I of the Complaint are admitted.

II

The allegations of paragraph II of the Complaint are admitted.

## III

The allegations of paragraph III of the Complaint are admitted.

## IV

The allegations of paragraph IV of the Complaint are admitted.

## V

The allegation in the first sentence of paragraph V of the Complaint – i.e., that the United States, through its Secretary of the Army and its Army Corp of Engineers and pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, examines and approves artificial additions to the coastline that will occupy navigable waters before such structures may be built – is admitted. To the extent that the second sentence of that paragraph alleges only that, in examining and approving an artificial addition to the coastline, the Secretary of the Army and the Corps of Engineers do consider, among other things, the effect of such additions on the offshore property interests of the United States, it is admitted. To the extent that the second sentence of that paragraph alleges that the consideration of the effect of such an addition on the offshore property interests of the United States is pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, however, the allegation is denied, and it is affirmatively alleged that Section 10 of the Rivers and Harbors Appropriation Act of 1899 does not authorize such consideration and that such consideration is without legal authority.

## VI

The allegations of paragraph VI of the Complaint are admitted.

## VII

The State of Alaska is without knowledge or information sufficient to form a belief as to the allegation of paragraph VII of the Complaint that the Army Corps of Engineers, in consultation with the United States Department of the Interior, concluded that the proposed Nome facility would extend the coastline of the State of Alaska, adversely affecting the property interests of the United States. The allegation of that paragraph that the Corps of Engineers requested that the State of Alaska waive any property rights it might obtain over submerged lands as a result of the City of Nome's construction of the facility is denied, and it is affirmatively alleged that the State of Alaska was notified by the Department of the Interior that the City of Nome's application for a Corps of Engineers permit to construct the facility would not be granted unless the State of Alaska waived any property rights it might obtain over submerged lands as a result of that construction.

## VIII

The allegations of paragraph VIII of the Complaint that the State of Alaska agreed to and executed a waiver, and that the City of Nome then built the harborworks, are admitted. The allegation of that paragraph that the waiver is valid and binding and forfeited any claim the

State of Alaska otherwise may have had over any submerged lands beyond three miles from the natural coastline is denied, and it is affirmatively alleged that the waiver expressly stated that "[t]his disclaimer [i.e., the waiver] becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line," thereby preserving the opportunity for the State of Alaska to contest the validity of the waiver and, if successful, to void it, leaving it without any binding effect. (The disclaimer is reprinted as the Appendix to the United States' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion.)

## IX

The allegations of paragraph IX of the Complaint that the United States now wishes to lease portions of the outer continental shelf in Norton Sound for the purpose of mineral recovery, and that the State of Alaska has requested the United States to delete the disputed area from the lease sale, are admitted. The allegation of that paragraph that the State of Alaska has asserted that it owns more than 1,000 acres of the proposed lease site as a result of the extension of its coastline caused by the Nome facility, notwithstanding its execution of the waiver, is denied, and it is affirmatively alleged that the State of Alaska claims an interest in the said 1,000 acres, contingent upon a final determination by a court of competent jurisdiction that the Corps of Engineers does not have the legal authority to require such a disclaimer

before issuing a permit for a project which might affect the coastline, and the waiver therefore is void and of no force and effect.

X

The allegations of paragraph X of the Complaint are denied, and it is affirmatively alleged that, by exceeding the authority granted to it under the Rivers and Harbors Act of 1899 and requiring that the State of Alaska waive any submerged lands claims it might have made as a result of the Nome facility before issuing the permit to construct that facility, the Corps of Engineers purported to divest the State of Alaska of its statutory rights under the Submerged Lands Act of 1953, thereby causing the State of Alaska great and irreparable injury for which it has no adequate remedy at law, and that the existence of this dispute between the United States and the State of Alaska over ownership of the said 1,000 acres has not interfered with the effective development of the natural resources of the affected area, the area being available for lease as disputed lands pursuant to section 7 of the Outer Continental Shelf Lands Act of 1953 and Alaska Statute 38.05.027.

WHEREFORE the State of Alaska prays:

1. That the Court enter a decree declaring that the Corps of Engineers does not have the legal authority to require a State to waive any submerged lands claims it might make following construction of an artificial structure extending the coastline before the Corps will issue a permit for construction of such a structure.

2. That the Court enter a decree declaring that, as a consequence of the Corps of Engineers' lack of authority to require such waivers, the waiver executed by the State of Alaska with respect to the Nome facility, by its terms, is void and of no force and effect.

3. That the Court enter a decree declaring that, as a consequence of the voiding of the waiver, the submerged lands described in paragraph IX of the Complaint appertain to the State of Alaska and are subject to its exclusive jurisdiction and control, and that the United States has no title thereto or interest therein.

4. For such other relief as the Court may deem appropriate.

DATED: May, 1991.

Respectfully submitted,

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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

---

ON BILL OF COMPLAINT

---

JOINT STIPULATION OF FACTS

---

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1991

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No. 118, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF ALASKA

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*ON BILL OF COMPLAINT*

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## **JOINT STIPULATION OF FACTS**

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On January 7, 1991, the United States requested leave of this Court to commence an original action to resolve a dispute between the United States and the State of Alaska concerning ownership of certain submerged lands beneath Norton Sound, near Nome, Alaska. See Motion of the United States for Leave to File Complaint, Complaint, and Brief in Support of Motion, No. 118, Orig. (O.T. 1990). Alaska did not object to the commencement of such an action. See Memorandum of the State of Alaska, No. 118, Orig. (O.T. 1990). On April 1, 1991, the Court granted the United States' motion for leave to file a bill of complaint, and on May 31, 1991, Alaska filed its answer. On June 28, 1991, the Court invited the United States and Alaska to file a stipulation of facts relevant to a decision in this action. The United States and the State of Alaska jointly stipulate as follows:

(1)

1. On August 25, 1982, the City of Nome, Alaska, filed an application with the Department of the Army, Alaska District Corps of Engineers (the Corps), for a federal permit, under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act, 33 U.S.C. 1344, to construct port facilities, including a causeway with road, a breakwater, and an offshore terminal area facility extending into Norton Sound. See App., *infra*, 1a-10a.

2. On October 20, 1982, the Corps issued a Public Notice of Application for Permit and invited interested persons to provide comments on whether the permit should be granted. See App., *infra*, 11a-16a.

3. On November 22, 1982, the Alaska OCS Region of the Minerals Management Service, United States Department of the Interior, filed an objection to the issuance of a Department of the Army permit on the ground that the City of Nome's construction of the port facilities would constitute an artificial accretion to the legal coast line. It requested that before issuing any permit, the Corps require Alaska to waive any future claims under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, based on the construction of the causeway. See App., *infra*, 17a-19a.

4. On April 4, 1983, the Corps requested comments from the Office of the Solicitor, Department of the Interior, pursuant to 33 C.F.R. 320.4(f), concerning the effect of the Nome project on the coast line. See App., *infra*, 20a-21a.

5. On May 16, 1983, the Solicitor responded that construction of the Nome facility would "move Alaska's coastline or baseline seaward of its present location" and that "[f]ederal mineral leasing offshore Alaska would be affected because the state-federal boundary, as well as international boundaries, are

measured from the coastline or baseline." See App., *infra*, 22a. The Solicitor recommended that "approval of the permit application be conditioned upon Alaska executing an agreement or a quit claim deed preserving the coastline and the state-federal boundary." *Ibid.*

6. On July 1, 1983, the Corps transmitted the Solicitor's letter to the Alaska Department of Natural Resources and stated that "in accordance with the attached letter from the Office of the Solicitor \* \* \* a [Department of the Army] permit will not be issued until \* \* \* a waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary." See App., *infra*, 24a.

7. On May 9, 1984, the Alaska Department of Natural Resources submitted a conditional disclaimer of rights to additional submerged lands that could be claimed by Alaska as a result of the construction of the Nome port facility. See App., *infra*, 26a-31a. The disclaimer provides in pertinent part:

1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Attorney General and main-



tains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coast line, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. This disclaimer is entered without prejudice to Alaska's right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

4. This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

*Id.* at 30a-31a.

8. By letter dated June 15, 1984, the Department of Justice informed the Corps that the disclaimer satisfied any objections that the Department of Justice and the Department of the Interior might have to the issuance of a Department of the Army permit. See App., *infra*, 32a.

9. On July 9, 1984, the Corps issued a statement of findings supporting the issuance of a Department of the Army permit for the Nome facility. See App., *infra*, 33a-37a. On the same date, the Corps sent a non-validated permit to the City of Nome for signature. See *id.* at 38a. The City Manager of Nome signed and returned the permit, and the Corps issued

the validated permit on July 25, 1984. See *id.* at 39a-49a.

10. The Department of the Army permit has been modified in certain respects since its issuance to reflect changes in the Nome project. See App., *infra*, 50a-51a. As originally permitted, the project was to include a causeway, approximately 85 feet wide, extending approximately 3575 feet seaward from the coast line into Norton Sound. As constructed, the causeway extends approximately 2700 feet seaward from the coast line into Norton Sound. See *id.* at 62a (diagram).

11. On March 11, 1988, the Minerals Management Service of the United States Department of the Interior published a "Request for Comments and Nominations for a Lease Sale in Norton Sound and Notice of Intent to Prepare an Environmental Impact Statement," which solicited public comment on the Minerals Management Service's proposed lease sale for hard-rock minerals, including gold, in the Norton Sound near Nome, Alaska. 53 Fed. Reg. 8134.

12. On April 11, 1988, the State of Alaska submitted comments stating, among other things, that the proposed Norton Sound Lease Sale involved submerged lands subject to its Nome project disclaimer (see para. 7, *supra*) and that the State intended to file a legal action, in accordance with the disclaimer, challenging the Corps' authority to require a waiver of rights to submerged lands. See App., *infra*, 52a-54a. Alaska also requested that the Minerals Management Service delete the disputed acreage from the proposed lease sale. See *id.* at 54a. The Minerals Management Service, meanwhile, prepared environmental analyses and circulated a proposed leasing

notice. See 53 Fed. Reg. 48,045 (1988); 55 Fed. Reg. 24,330 (1990).

13. On May 22, 1990, the State of Alaska provided notice, pursuant to 28 U.S.C. 2409a(m), that it intended to file a lawsuit to quiet title to the submerged lands in Norton Sound that are more than three miles from the natural shoreline but within three miles of the low water line of the constructed, solid-fill Nome causeway. See App., *infra*, 55a-59a. In an attachment to the letter, Alaska described the approximately 730-acre area associated with the 2700 foot causeway as the "Port of Nome" tract. See *id.* at 60a-61a. Alaska suggested that the United States either delete the disputed acreage from the proposed lease sale or enter into an agreement, pursuant to Section 7 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1336, and Alaska Stat. § 38.05.027 (1990), that would direct the revenues from the disputed acreage into an escrow account pending final resolution of the ownership issue. See *id.* at 58a.

14. Thereafter, on January 7, 1991, the United States requested leave of this Court to commence this action. The Court granted the United States' motion for leave to file a bill of complaint on April 1, 1991.

15. On June 21, 1991, the Minerals Management Service published a final leasing notice soliciting bids for the Norton Sound Lease Sale. 56 Fed. Reg. 28,656 (1991). On July 23, 1991, the United States and the State of Alaska entered into an agreement, pursuant to Section 7 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1336, and Alaska Stat. § 38.05.137 (1990), directing the revenues from the disputed acreage into an escrow account for payment to the United States or to Alaska, depending on the outcome of this action. The bidding period closed

and no bids were received. The United States and Alaska agree, however, that a live controversy remains in light of their continuing disagreement as to the location of the federal-state boundary and the prospect of future lease sales in the area.

16. In at least nine other instances, prior to issuing a permit for construction of artificial additions to the coast line, the Corps has sought and obtained from a State a disclaimer or other agreement waiving the State's claim to additional submerged lands based on the additions to the coast line. In at least two other instances, the Corps has issued a permit for construction of similar artificial additions to the coast line without obtaining such a disclaimer. A compilation of such permits and disclaimers will be lodged with the Clerk of the Court.

Respectfully submitted.

CHARLES E. COLE  
*Attorney General*  
*State of Alaska*

KENNETH W. STARR  
*Solicitor General*  
*Counsel for the United States*

JOHN G. GISSBERG  
*Assistant Attorney General*  
*Counsel for the State of Alaska*

SEPTEMBER 1991



## APPENDIX A

### APPLICATION FOR A DEPARTMENT OF THE ARMY PERMIT

For use of this form, see EP 1145-2-1

The Department of the Army permit program is authorized by Section 10 of the River and Harbor Act of 1899, Section 404 of P.L. 92-500 and Section 103 of P.L. 92-532. These laws require permits authorizing structures and work in or affecting navigable waters of the United States, the discharge of dredged or fill material into waters of the United States, and the transportation of dredged material for the purpose of dumping it into ocean waters. Information provided in ENG Form 4345 will be used in evaluating the application for a permit. Information in the application is made a matter of public record through issuance of a public notice. Disclosure of the information requested is voluntary; however, the data requested are necessary in order to communicate with the applicant and to evaluate the permit application. If necessary information is not provided, the permit application cannot be processed nor can a permit be issued.

One set of original drawings or good reproducible copies which show the location and character of the proposed activity must be attached to this application (see sample drawings and check list) and be submitted to the District Engineer having jurisdiction over the location of the proposed activity. An application that is not completed in full will be returned.



1. Application number (To be assigned by Corps)  
JDM Norton Sound 36  
071-0YD-2-820546
2. Date  
25      8      82  
Day   Mo.   Yr.
3. For Corps use only.  
Received  
Aug. 25, 1982  
7 Sept. '82
4. Name and address of applicant.  
City of Nome  
P.O. Box 281  
Nome, Alaska 99762  
Attn: Ivan Widom, City Manager  
Telephone no. during business hours  
A/C (907) 443-5242  
A/C (   ) \_\_\_\_\_
5. Name, address and title of authorized agent.

Telephone no. during business hours

A/C (   ) \_\_\_\_\_

A/C (   ) \_\_\_\_\_

6. Describe in detail the proposed activity, its purpose and intended use (private, public, commercial or other) including description of the type of structures, if any to be erected on fills, or pile or float-supported platforms, the type, composition and quantity of materials to be discharged or dumped and means of conveyance, and the source of discharge or fill material. If additional space is needed, use Block 14.



This application supercedes 071-OYD-2-800311 and addresses comments regarding that application.

### SUMMARY

The proposed port facilities include phase I construction of a 3575' causeway to reach the 30 foot water depth, a breakwater and 250' x 800', 4.6 acre offshore terminal area for short term cargo storage with an 800' dock structure for barge berths, and a 10 acre upland long term cargo storage area with a maintenance shop and container freight station for cargo handling.

700,000 cubic yards of core materials for the causeway and offshore terminal will be dredge tailings trucked from upland pits within 3 miles of Nome, placed by end dumping. 300,000 cubic yards of filter material and 254,000 cubic yards of armor rock will be quarried at Cape Nome, approximately 15 miles from the project. This material will probably be trucked, using a new by-pass road to be constructed by Alaska DOT/PF\* (or alternatively over the sea ice in winter), although the armor rock might be barged if a loading facility at Cape Nome is completed. The filter material will be placed by end dumping. The armor rock will be placed by crane. The dock structure consists of 30' diameter concrete caissons 31' on center with grouted connections, supporting a concrete dock wall. Two forklift ramps are provided for dry cargo transfer. Two fuel discharge manifolds, each having

---

\* North Sound 35 #071-OYD-4-820435.

two 8" diameter and four 6" diameter pipes, are provided for transfer of diesel and gasoline fuels to an upland tank farm. An 8" water line with a 3" recirculation line from the city water supply provides potable water and fire protection. Sewage will be transferred from vessel holding tanks to the city system by pump truck. Portable toilets will be provided at the offshore terminal.

---

A breach in the causeway with a 98' long prestressed concrete bridge is provided at the 8' water depth. The bridged opening has been requested by the Alaska Department of Fish and Game to permit migration of juvenile fish along the shoreline. A secondary benefit of this breach is the shoreline accessibility provided for small boats without the hazard of rounding the head in deeper water.

The opening is located at the most acceptable depth to meet Alaska Department of Fish and Game requirements and also minimize maintenance dredging from littoral beach accumulation.

Phase II construction consists of a 100' x 400' marshalling yard with two 400' x 60' piers to provide 8 berths for oil rig service vessels. 220,000 cubic yards of dredge tailings from upland sites would be placed by end dumping. The pier structure consists of 57' diameter steel sheet pile cells 63' on center, supporting concrete dock walls. Cathodic protection and epoxy coating corrosion protection are provided for the steel

piling. Water, fuel, and electrical services will be provided.

## NEED FOR PROJECT AND ALTERNATIVES CONSIDERED

The City of Nome, Alaska, serves as a trade, service, and transportation center for much of northwest Alaska. According to the 1980 census, approximately 11,200 people live within the Nome service region, with a population of over 3200 in the immediate Nome area.

Due to its remote location (over 500 air miles from Anchorage or Fairbanks), the city is heavily dependent on waterborne shipments of consumable and durable goods, construction materials and equipment, and gasoline, heating oil, and other petroleum products. Cargoes destined for Nome are currently barged in during the five month (June to October) ice-free season.

The existing port facility is located at the mouth of the Snake River within the Nome city limits. Built and maintained by the Corps of Engineers in the estuary of the Snake River, the harbor is characterized by a seventy-five foot wide entrance channel and a two-hundred-fifty foot by six-hundred foot turning basin. The entrance channel and turning basin require annual dredging by the Corps to maintain an operating depth of approximately eight feet. The north revetment of the turning basin cur-

rently functions as the only dock in Nome Harbor.

Due to the shallow draft and limited width of the entrance channel and turning basin, the existing port can only accommodate relatively small barges and tugs. Ocean-going vessels currently anchor in forty to fifty feet of water one mile from shore, and cargo is lightered to the protected harbor.

The lack of adequate port facilities represents a major deterrent to development of the region. The extra handling required to lighter cargoes adds significantly to the costs of transporting cargoes to Nome. The proposed project would greatly reduce these costs, as well as play a major role in the economic development of Northwest Alaska.

The location and type of structure proposed in this application have been analyzed during separate prefeasibility and feasibility studies. Alternatives considered and eventually rejected included: (1) expansion of existing harbor basin; (2) a causeway situated at Cape Nome; (3) a causeway further west of the city; (4) a shorter causeway with dredged channel.

## CONSTRUCTION ON PERMAFROST

Onshore storage areas situated on permafrost will be constructed over a pad of nine foot fill consisting of dredge tailings, designed to provide a thermal blanket. A 24-foot wide roadway on a 32-28-foot wide em-

bankment will connect the causeway to the onshore facilities and existing city roads. Where necessary due to permafrost conditions, road construction will include excavation and backfilling with dredge tailings as described above.

## OIL SPILL PROTECTION

Fuel discharge manifolds at the barge dock will have sumps sized to meet Coast Guard and ADEC regulations. Pipelines (two 8" and four 6") will be buried within the causeway and road embankment. Design flow rate for an 8" line is 2000 gpm and for a 6" line is 1000 gpm. At the bridge (high point in the pipeline), a 6000 gallon containment vessel will be suspended between girders under the pipelines.

A sensor triggering an audible alarm at the pumps would be activated by a float in the event of a break during pumping. Prior to operation of the facility, an oil spill contingency plan will be filed with ADEC.

[Diagrams omitted]

7. Names, addresses and telephone numbers of adjoining property owners, lessees, etc., whose property also adjoins the waterway.

Alaska Gold Co., P.O. Box 640, Nome, AK 99762  
Att'n: Dennis Campion Tel. (907) 443-5272

Bureau of Indian Affairs, P.O. Box 1108, Nome, AK 99762 Att'n: Paul Sterling Tel. (907) 443-2284

8. Location where property activity exists or will occur.

Address:

End of West Limit Street

Street, road or other descriptive location

None

In or near city or town

Alaska 99762

County      State      Zip Code

Tax Assessors Description: (If known)

Map. No.	Subdiv. No.	Lot No.
26-27	11S	34W
Sec.	Twp.	Rge.

9. Name of waterway at location of the activity.  
Norton Sound
10. Date activity is proposed to commence. June 1988  
Date activity is expected to be completed. October 1986
11. Is any portion of the activity for which authorization is sought now complete? ☐ YES  
☒ NO  
If answer is "Yes" give reasons in the remark section. Month and year the activity was completed \_\_\_\_\_. Indicate the existing work on the drawings.
12. List all approvals or certifications required by other federal, interstate, state or local agencies for any structures, construction, discharges, de-



posits or other activities described in this application.

Issuing Agency      Type Approval

Identification No.      Date of Application

Date of Approval

13. Has any agency denied approval for the activity described herein or for any activity directly related to the activity described herein?

☐ Yes      ☒ No      (If "Yes" explain in remarks)

14. Remarks (Checklist, Appendix H for additional information required for certain activities).

15. Application is hereby made for a permit or permits to authorize the activities described herein. I certify that I am familiar with the information contained in this application, and that to the best of my knowledge and belief such information is true, complete, and accurate. I further certify that I possess the authority to undertake the proposed activities.

/s/ Ivan L. Widom  
Signature of Applicant or  
Authorized Agent

The application must be signed by the applicant; however, it may be signed by a duly authorized agent (named in Item 5) if this form is accompanied by a statement by the applicant designating the agent and agreeing to furnish



upon request, supplemental information in support of the application.

18 U.S.C. Section 1001 provides that: Whoever, in any manner [*sic*] within the jurisdiction of any department or agency of The United States knowingly and willfully falsifies, conceals, or covers up any trick, scheme, or device a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both. Do not send a permit processing fee with this application. The appropriate fee will be assessed when a permit is issued.

**APPENDIX B**

**PUBLIC NOTICE OF APPLICATION  
FOR PERMIT**

[LOGO]

US Army Corps  
of Engineers

Alaska District  
Alaska District  
Regulatory Functions Branch  
P.O. Box 7002  
Anchorage, Alaska 99510

Public Notice Date: 20 October 1982  
Expiration Date: 22 November 1982  
Reference Number: 071-OYD-2-820546  
Waterway Number: Norton Sound 36

Interested parties are hereby notified that an application has been received for a Department of the Army permit for certain work in waters of the United States, as described below and shown on the attached plan.

**APPLICANT:** City of Nome, P.O. Box 281, Nome, Alaska 99762

**LOCATION:** Sections 26, 27, T. 11 S., R. 34 W., K.R.M., Nome, Alaska

**WORK:** To place approximately 1,477,000 cubic yards of fill to construct an offshore storage area and roadway system, an offshore storage area-barge berthing facility, and an earth-filled pier connecting the onshore and offshore facilities.

Approximate dimensions for the proposed structures are as follows:

a. A 3,575' long x 85' wide (crown) x 16' above sealevel (ranging from 16' to approximately 50' deep) pier, which would be protected with approximately 10-15' of armor rock; side slopes would be 1.5:1;

b. a 250' wide x 800' long x 40' deep general cargo storage that would be constructed at the seaward terminus of the pier; a 15' layer of armor rock would protect the 1.5:1 side slopes, the dock structure would consist of 30' diameter concrete caissons, 31' on center with grated connections;

c. a 520' long x 100' wide marshalling yard would connect the proposed barge docking facility and a future phase II oil rig service marshalling area adjacent to "b" above;

d. a 1200' long x 450' x 9' deep (10 acre) onshore storage pad west of the pier road; a 26' crown width road, with 4:1 side slopes would surround the storage pads; and

e. a 2400' long x 52' wide x 9' to 16' (variable) deep road system would connect the offshore storage area to the pier; the following components comprise this road system;

1. The western spur would be approximately 260' long x 16' wide x 8'-11' (variable) deep, with 4:1 side slopes;

2. the northeastern spur would be approximately 530' long x 40' wide x 6' deep with 2:1 side slopes; this spur would run from the NE Terminus to a central tangent point;

3. a 140' long x 16' wide x 6' deep spur, with 2:1 side slopes, running SE from the NE spur (in "2" above) to the beach;

4. a 400' long x 52' wide x 4'-10' (variable) deep road, with 4:1 side slopes, from the shoreline to the SE corner of the proposed onshore storage pad; and
5. a 800' long x 52' wide x 4'-10' (variable) deep road with 4:1 side slopes, running north of the juncture point (in "4" above) along the east side of the storage pad approximately 370' past the NE corner of that pad.

Breakdown of the fill types and quantities are as follows:

- a. Dredge tailings for the pier and terminal facilities core—700,000 cubic yards;
- b. 300,000 cy of quarry rock for the pier and terminal facilities filter;
- c. 254,000 cy quarry rock for the pier and terminal facilities armor slope protection;
- d. 63,000 cy of dredge tailings for the road system between the onshore storage pad and the pier;
- e. 93,000 cy non-frost susceptible dredge tailings for the onshore storage pad;
- f. 24,000 cy of dredge tailings for the road system between the onshore storage pad and the pier; and
- g. 10,000 cy of non-frost susceptible dredge tailings for the onshore road system.

Possible future construction would consist of an expansion of the onshore storage area with a pad approximately 500'x400' to the west of the original proposed pad and a pad approximately 1800'x40'x 1800'x800' to the north of the original proposed pad.

**PURPOSE:** To provide needed waterborne barge and marine vessel docking and port facilities for Nome, whose remoteness requires most goods to be received via air freight or barge. The existing Corps

of Engineers' dock in Nome can only handle shallow draft vessels. To accommodate these vessels annual dredging of the dock area is required. Ocean going vessels must anchor a mile offshore to find adequate water depth.

**ADDITIONAL INFORMATION:** A breach in the causeway approximately 400' offshore, and in 8' of water, would be provided to aid salmon migration.

**AUTHORITY:** This permit will be issued or denied under the following authorities:

(X) Perform work in or affecting navigable waters of the United States Section 10, River and Harbor Act 1899 (33 U.S.C. 403).

(X) Discharge dredged or fill material into waters of the United States Section 404, Clean Water Act (33 U.S.C. 1344).

**WATER QUALITY CERTIFICATION:** A permit for the described work will not be issued until a certification or waiver of certification as required under Section 401 of the Clean Water Act (Public Law 95-217), has been received from the Alaska Department of Environmental Conservation.

**COASTAL ZONE MANAGEMENT ACT CERTIFICATION:** Section 307(c)(3) of the Coastal Zone Management Act of 1972, as amended by 16 U.S.C. 1456(c)(3), requires the applicant to certify that the described activity affecting land or water uses in the Coastal Zone complies with the Alaska Coastal Management Program. A permit will not be issued until the Division of Policy Development and Planning has concurred with the applicant's certification.

**EIS DETERMINATION:** A preliminary determination has been made that an environmental impact statement is not currently required for the described work.

**PUBLIC HEARING:** Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing.

**CULTURAL RESOURCES:** The property described is not a registered or eligible property in the latest published version of the National Register of Historic Places.

**ENDANGERED SPECIES:** Preliminarily, this described activity will not affect endangered species, or their critical habitat designated as endangered or threatened, under the Endangered Species Act of 1973 (87 Stat. 844). Formal consultation under Section 7 of the Act is not required for the described activity.

**FLOOD PLAIN MANAGEMENT:** Evaluation of the described activity will include conformance with appropriate State o[r] local flood plain standards; consideration of alternative sites and methods of accomplishment; and weighing of the positive, concentrated and dispersed, and short and long-term impacts on the flood plain.

**EVALUATION:** The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and



utilization of important resources. The benefit which reasonably may be expected to accrue from the proposals must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among these are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety production and, in general, the needs and welfare of the people.

Comments on the described work, with the reference number, should reach this office no later than the expiration date of this Public Notice to become part of the record and be considered in the decision. If further information is desired concerning this notice, contact Jerome Madden at (907) 552-4942 or 279-4123.

FOR THE DISTRICT ENGINEER:

/s/ Jack L. Ferrise

JACK FERRISE

Acting Chief, Interior Permit  
Processing Section

Regulatory Functions Branch

- 3 Incl
- 1. Plan
- 2. ACMP Notice
- 3. 401 Notice

[Enclosures omitted]



APPENDIX C

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
MINERALS MANAGEMENT SERVICE

Alaska OCS Region

[SEAL]

Offshore Leasing  
P.O. Box 1159  
Anchorage, AK 99510  
Ph: 907-276-2955

Offshore Operations & Evaluations  
800 A Street, Suite 201  
Anchorage, AK 99501  
Ph: 907-271-4304

Colonel Lee R. Nunn  
District Engineer  
Corps of Engineers  
Department of the Army  
Alaska District  
P.O. Box 7002  
Anchorage, AK. 99510

November 22, 1982

Re: Public Notice 071-OYD-2-820546

Dead Colonel Nunn:

The Minerals Management Service's (MMS) objection to issuance of a permit for the Nome dock expansion still remains. The principle followed by the Federal Government in matters such as this was enunciated by the United States Supreme Court in *United States v. California*, S. Ct. No. 5, Original. The Court adopted the report of the Special Master regarding the effect of artificial accretions on the legal "coastline," stating

The Special Master ruled that lands so enclosed or filled belonged to California because such artificial changes were clearly recognized by international law to change the coastline. Further-

more, the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwanted artificial structures, and the effect of any future changes could thus be the subject of agreement between the parties.

\* \* \* \*

Arguments based on the inequity to the United States of allowing California to effect changes in the boundary between Federal and State submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters.

381 U.S. 139, 177 (1965).

The Interior Department consistently follows a policy of protecting the rights of the United States in all cases of artificial coastline accretion that come to its attention. In keeping with the Supreme Court opinion, we do this primarily through the Federal Government's control over navigable waters, which is exercised through the Corps of Engineers permitting process.

In this case, the MMS is simply following the apparent suggestion of the Supreme Court in seeking an agreement from the State regarding the effect of a future change in the coastline. We are attempting to do nothing more than preserve the status quo by protecting property rights to which the United States is now clearly entitled. On the other hand, by agreeing not to assert a future claim based upon the dock extension, as other States have done in similar situations, the State of Alaska would give up absolutely

nothing in the way of property or claims to which it is now entitled. It would simply give up a possible future claim to a windfall gain at the expense of the Federal Government.

I should also point out that any territorial claim which Alaska might make based upon the Nome causeway would not be dependent upon the *U.S. v. Alaska* boundary litigation now pending before the Supreme Court. The United States has conceded that an artificial extension of the coastline, if constructed in full compliance with applicable Federal regulations, can extend a State's submerged lands. By requesting that you require a waiver before permits are issued, we are trying to avoid a situation like the ARCO pier extension that resulted in litigation.

If more information is needed please free to call. You may also wish to contact the Solicitor's Office on 343-4325.

Sincerely yours,

/s/ Esther C. Wunnicke  
ESTHER C. WUNNICKE  
Acting Regional Manager

APPENDIX D

DEPARTMENT OF THE ARMY  
ALASKA DISTRICT CORPS OF ENGINEERS  
ANCHORAGE, ALASKA 99506

April 4, 1983

Regulatory Functions Branch  
Interior Permit Processing

Mr. William H. Coldiron  
Office of Solicitor  
Department of Interior  
18th and "C" N.W.  
Washington, DC 20240

Dear Mr. Coldiron:

This refers to the enclosed permit application public notice involving structures affecting coastal water that may modify the coast line or base line from which the territorial sea is measured. This is being sent to you for comment as prescribed in 33 CFR Section 320.4(f).

The enclosed public notice number 071-OYD-2-820646, Norton Sound 36, causeway/barge berthing facilities, Nome, Alaska, should provide adequate descriptions of the proposed activity.

The Alaska District Corps of Engineers solicits your comments regarding this proposal. A copy of the public notice and plans are enclosed.

Sincerely,

/s/ Colonel Neil E. Saling  
NEIL E. SALING  
Colonel, Corps of Engineers  
District Engineer

Enclosure

Copies Furnished:

Mr. John Allen  
Regional Solicitor,  
Department of Interior  
840 C Street, Suite 100  
Anchorage, Alaska 99506

[Enclosure Omitted]

APPENDIX E

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON DC 20240

[SEAL]

May 16, 1983

Colonel Neil E. Saling  
District Engineer  
Corps of Engineers  
Department of the Army  
Alaska District, Pouch 898  
Anchorage, Alaska 99506

Dear Colonel Saling:

This responds to your request for comments concerning Nome's application for a permit "to place approximately 1,477,000 cubic yards of fill to construct an offshore storage area and roadway system, . . . barge berthing facility, and an earth filled pier." (Reference number 071-OYD-2-820546.)

The proposed construction would move Alaska's coastline or baseline seaward of its present location. Federal mineral leasing offshore Alaska would be affected because the state-federal boundary, as well as international boundaries, are measured from the coastline or baseline.

To prevent modification of the outer Continental Shelf rights of the United States, we recommend that approval of the permit application be conditioned upon Alaska executing an agreement or a quit claim deed preserving the coastline and the state-federal boundary. Such agreements have been encouraged by the

Supreme Court, and have been entered into by other states as well as Alaska. See, e.g., *United States v. California*, 381 U.S. 139, 176 (1965). The agreement or quit claim deed would simply maintain the status quo; it would not affect property or claims to which Alaska is now entitled. Should Alaska execute the agreement or quit claim deed, so that the Nome project would not be construed as moving the baseline or state-federal boundary, we would have no objection to approval of the Nome project.

Please advise us of your action on this permit application.

Sincerely,

/s/ Jean Kingry  
For Solicitor



APPENDIX F

DEPARTMENT OF THE ARMY  
ALASKA DISTRICT CORPS OF ENGINEERS  
ANCHORAGE, ALASKA, 99506

July 1, 1983

Regulatory Functions Branch  
Interior Permit Processing Section

Ms. Sharon Barton  
Alaska Department of Natural  
Resources  
Pouch M  
Juneau, Alaska 99811

Dear Ms. Barton:

In regard to the City of Nome's application for a Department of the Army (DA) permit, file number 071-OYD-2-820546, Norton Sound 36, to place fill material to construct a port facility in Nome, Alaska. This is to inform you that in accordance with the attached letter from the Office of the Solicitor, dated May 16, 1983 a DA permit will not be issued until an agreement has been reached between the Alaska Department of Natural Resources and the City of Nome, and a waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary. As per the telephone conversation between Mrs. Georgina Akers and yourself, we will expect your decision on this matter by July 20, 1983.

If you have any further questions, please contact Mrs. Georgina Akers of my staff at the address above, or call (907) 279-1123.

25a

Sincerely,

/s/ David B. Barrows  
Chief  
Regulatory Functions Branch

Enclosure

Copies Furnished:

Ivan Widom, City Manager  
City of Nome  
P.O. 281  
Nome, Alaska 99762

Mr. Michael Marten  
TAMAS Engineers  
4791 Business Park Blvd., Suite 1  
Anchorage, Alaska 99083

[Enclosure Omitted]

APPENDIX G

STATE OF ALASKA  
DEPARTMENT OF NATURAL RESOURCES  
OFFICE OF THE COMMISSIONER

Colonel Neil Saling  
U.S. Corps of Engineers  
District Engineer  
Pouch 898  
Anchorage, Alaska 99506

May 9, 1984

Dear Colonel Saling:

Enclosed is the State of Alaska's disclaimer to additional submerged lands based on construction of the Nome port facility. It is our understanding that it has been approved as to form by representatives of both the United States Attorney General and the Solicitor of the United States Department of the Interior.

We hope the submission of this disclaimer will enable the Corps of Engineers to issue the permit for construction of the Nome port facility without further delay. If we can do anything more in this regard, please contact us at your earliest convenience.

Sincerely,

/s/ Esther C. Wunnicke  
ESTHER C. WUNNICKE  
Commissioner

ECW:CTK:djc

Enclosure

cc: Louis F. Claiborne, Esq.  
Lawrence J. Jensen, Esq.  
Lyle Carson  
R. Eldridge Hicks

## DISCLAIMER

WHEREAS, the City of Nome ("Nome") has applied to the United States Army Corps of Engineers for a permit to construct a port facility at Nome;

WHEREAS, the project for which Nome is seeking the Corps of Engineers permit is fundamental to economic development in Northwestern Alaska;

WHEREAS, both statewide and nationwide benefits will be derived from the proposed Nome port facility through increased employment, increased revenue generated, and enhanced economic opportunities in Northwestern Alaska and the adjacent outer continental shelf;

WHEREAS, under the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., construction of such a facility might affect the location of the coast line boundary of the State of Alaska, including the offshore boundary between the outer continental shelf and state-owned lands beneath navigable water;

WHEREAS, under 33 C.F.R. § 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of the Interior if a project for which a permit is sought might affect the coast line;

WHEREAS, the Corps of Engineers has consulted the Attorney General and the Solicitor pursuant to 33 C.F.R. § 320.4(f);

WHEREAS, the Corps of Engineers has been requested by the Attorney General and the Solicitor to withhold approval of Nome's permit application because of the potential effect on Alaska's coast line;

WHEREAS, the Corps of Engineers has determined that it will not issue such a permit over the Attorney General's and the Solicitor's objections on this ground;

WHEREAS, the Attorney General's and the Solicitor's objections to the permit application on this ground would be removed if a binding disclaimer is entered by the State of Alaska to the effect that Alaska does not, and will not, treat the facility as extending its coast line for purposes of the Submerged Lands Act;

WHEREAS, the Alaska Attorney General, in a formal opinion dated October 29, 1980, concluded that the Alaska Commissioner of Natural Resources has the power to issue such a disclaimer;

WHEREAS, Alaska would enter such a disclaimer without objection if the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska and the United States disagree as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska would not enter such a disclaimer but for the Corps of Engineers' determination that it will not issue the permit unless such a disclaimer is entered, thereby removing the Attorney General's and the Solicitor's objections to issuance of the permit;

WHEREAS, it is neither in the United States interest nor in Alaska's interest to delay construction of the Nome port facility while the question of the Corps

of Engineers' legal authority to require such a disclaimer is resolved;

WHEREAS, this disclaimer is entered without prejudice to Alaska's right to file an appropriate action to determine whether the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit;

WHEREAS, this disclaimer is fully effective and binding upon the State of Alaska, but becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction that the Corps of Engineers does not have of the legal authority to require such a disclaimer prior to issuing such a permit; and

WHEREAS, it is the intent of both the United States and Alaska that this disclaimer remove the Attorney General's and the Solicitor's objections to issuance of the permit for construction of the Nome port facility, thereby allowing the construction to proceed, while at the same time preserving both the United States' legitimate interest is not having Alaska's coast line extended if the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit and Alaska's interest in not being bound by such a disclaimer if the Corps of Engineers does not have such legal authority;

THEREFORE, the State of Alaska, acting by and through the Commissioner of Natural Resources, pursuant to the authority granted to the commissioner by art. VIII, sec. 1 of the Alaska Constitution, AS 38.05.020(b), AS 38.05.027(a), AS 38.05.035(a) (14), and AS 38.05.0315(a), declares and agrees as follows:



1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Attorney General and maintains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coast line, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. This disclaimer is entered without prejudice to Alaska's right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

4. This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing



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a permit for a project which might affect the coast line.

DATED:  
May 9, 1984

STATE OF ALASKA

/s/ Esther C. Wunnicke  
ESTHER WUNNICKE,  
Commissioner  
Department of Natural  
Resources

**APPENDIX H**

**U.S. DEPARTMENT OF JUSTICE  
OFFICE OF THE SOLICITOR GENERAL  
Washington, D.C. 20530**

June 15, 1984

Colonel Neil Saling  
District Engineer  
United States Army  
Corps of Engineers  
Pouch 898  
Anchorage, Alaska 99506

Dear Colonel Saling:

Re: Artificial coastline construction  
in the area of Nome, Alaska.

The State of Alaska has now disclaimed any Submerged Land Act consequence of the proposed jetty for Nome. That disclaimer satisfies any objection which the Department of Justice might otherwise have interposed to the issuance of a permit for that jetty. We have been advised by the Office of the Solicitor, United States Department of the Interior, that the disclaimer has likewise satisfied any possible Submerged Lands Act concern of that Department.

Thank you for giving us the opportunity to review the application.

Sincerely,

/s/ Louis F. Claiborne  
LOUIS F. CLAIBORNE  
Deputy Solicitor General

## APPENDIX I

SECTIONS 10 & 404  
STATEMENT OF FINDINGS

This concerns the decision to issue a Department of the Army permit under Section 10 of the River and Harbor Act of 3 March 1899 (30 Stat. 1151; 33 U.S.C. 403) and Section 404 of the Clean Water Act (Public Law 95-217) to place approximately 1,477,000 cubic yards of fill to construct an onshore storage area and roadway system, an offshore storage area-barge berthing facility, and an earth-filled pier connecting the onshore and offshore facilities.

1. I have reviewed and evaluated, in light of the overall public interest, the documents and factors concerning the permit application, as well as the stated views of other interested Federal and non-federal agencies and the concerned public relative to the proposed work in waters of the United States.
2. The possible consequences of this proposed work have been evaluated and the work is in accordance with regulations published in 33 CFR, Parts 322 and 323. Factors bearing on my review include conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, and, in general, the needs and welfare of the people.
3. In evaluation of this work and consideration of comments received from coordination of Public Notice NPACO No. 071-OYD-2-820546 dated October 20, 1982 the following points are considered pertinent:

a. *Federal Agencies*: The U.S. Fish and Wildlife Service had concerns and requested one special condition. The concerns were resolved by modification of the applicant's proposal (causeway breach). The recommended special condition is incorporated in the ADEC certification. The National Marine Fisheries Service requested two special conditions. The first condition (monitoring program) was incorporated into the applicant's proposal. The second condition was included on the permit. The Environmental Protection Agency requested one condition (monitoring program). This condition was incorporated into the applicant's proposal and referred to in the special conditioning of this permit. The Department of the Interior objected to the issuance of the permit unless an agreement was signed by the State of Alaska to waive its rights to any additional submerged lands created by the construction of this project. This agreement has been signed by the State of Alaska and approved by the Office of the Solicitor. The U.S. Coast Guard had no objections to the proposed work, and informed the applicant of the requirements necessary for this type of project.

b. *State & Local Agencies*: The Alaska Department of Fish and Game had no objection to the proposed project and did not request that any special conditions be included in the permit. The Alaska Department of Natural Resources, and the Advisory Council on Historic Preservation concurred with this office that the proposed project would not adversely affect the two historical sites located within the area. The Alaska Department of Environmental Conservation (ADEC) issued a Certificate of Reasonable Assurance pursuant to Section 401 of the Clean Water Act and in accordance with the Alaska Water Quality Standards with seven stipulations. In accordance

with 33 U.S.C. 1341, all conditions of the ADEC certification are incorporated as part of the DE permit; therefore, they are not listed as special conditions. The Alaska Division of Governmental Coordination certified that the proposed work is consistent with the Alaska Coastal Management Program with the same stipulations that were included on the ADEC 401 certification.

It is presumed from the comments received from the State of Alaska and the lack of response from local agencies that the proposed work conforms with applicable local laws, regulations, and codes, and is in keeping with similar activities found in Alaskan waters.

c. *Individuals or Organized Groups*: No individuals or organized groups commented on the proposed work. The work is not considered to be contrary to the general public interest.

d. *Other Considerations*: An ecological evaluation as required by Section 404(b)(1) of the Clean Water Act has been made following the evaluation guidance in 40 CFR 230.4, in conjunction with the evaluation considerations in 40 CFR 230.5. The proposal was found to comply with the 404(b)(1) guidelines with inclusion of the following three special conditions:

(1) That the permittee shall dredge the breach and entrances to the design depth (8 feet below MLLW), when deposition has reduced the design depth to a depth of 3 feet below MLLW. The permittee shall contact the District Engineer (D.E.) prior to performing any dredging of the breach and entrances. The dredged material shall be placed at a site approved by the D.E. The breach and entrances shall be kept open or maintained over the life of the project.

(2) That the permittee shall implement the approved Littoral Drift Monitoring program prior to the construction of the causeway or any related structure. This monitoring program shall continue for the life of the project, unless determined otherwise by the D.E.

(3) That should the D.E. determine, through the monitoring program, that significant shoreline erosion is occurring the permittee shall be required to develop and implement a shoreline protection program to the satisfaction of the D.E.

These conditions were included.

4. I find that issuance of the Department of the Army permit as prescribed by regulations published in 33 CFR, Part 322 and 323 and with scope of work as described in the introduction to this document, and in accordance with the drawings attached to Public Notice NAPCO No. 071-OYD-2-820546 dated October 20, 1982 is based on thorough analysis and evaluation of the various factors enumerated above; that there are no reasonable alternatives available to the applicant that will achieve the purposes for which the work is being conducted; that the proposed work is in accordance with the overall desires of the public as reflected in the comments of State and local agencies and the general public; that the proposed work is deemed to comply with established State and local laws, regulations, and codes; that there have been no identified significant adverse environmental effects related to the work; that the issuance of this permit is consonant with national policy, statutes, and administrative directives; and that on balance, the total public interest would best be



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served by the issuance of a Department of the Army permit to the city of Nome for the proposed work.

FOR THE DISTRICT ENGINEER:

/s/ David B. Barrows  
DAVID B. BARROWS  
Chief, Regulatory Branch

Date 9 Jul 84



**APPENDIX J**

**DEPARTMENT OF THE ARMY  
ALASKA DISTRICT CORPS OF ENGINEERS  
ANCHORAGE, ALASKA 99506**

Regulatory Branch  
Permit Processing Section

9 JUL 1984

Lyle Larson, City Manager  
Post Office Box 281  
Nome, Alaska 99762

Dear Mr. Larson:

Enclosed are the original and one copy of the Department of the Army permit, file number 071-OYD-2-820546, Norton Sound 36, to place fill material to construct an earth filled pier connection onshore and offshore facilities, near Nome, Alaska. Please sign, date, and return both copies to this office for validation.

The Alaska Department of Environmental Conservation has issued a Certificate of Reasonable Assurance pursuant to Section 401 of the Clean Water Act for your project and they have found it to be in accordance with the Alaska Water Quality Standards. In addition, the Alaska Division of Environmental Coordination has certified that your project is consistent with the Alaska Coastal Management Program.

It should be understood that this is not an authorization to commence construction. No work is to be performed in the waterway or adjacent wetlands until you have received a validated copy of the permit.

Sincerely,

DAVID A. BARROWS  
Chief, Regulatory Branch

[Enclosure Omitted]

## APPENDIX K

Application No. 071-OYD-2-820546

Name of Applicant City of Nome

Effective Date 25 July 1984

Expiration Date (*If applicable*)

File No. Norton Sound 36

DEPARTMENT OF THE ARMY  
PERMIT

Referring to written request dated August 25, 1982  
for a permit to:

(X) Perform work in or affecting navigable waters  
of the United States, upon the recommendation of the  
Chief of Engineers, pursuant to Section 10 of the  
Rivers and Harbors Act of March 3, 1899 (*33 U.S.C.*  
*403*);

(X) Discharge dredged or fill material into waters of  
the United States upon the issuance of a permit from  
the Secretary of the Army acting through the Chief  
of Engineers pursuant to Section 404 of the Clean  
Water Act (*33 U.S.C. 1344*);

( ) Transport dredged material for the purpose of  
dumping it into ocean waters upon the issuance of a  
permit from the Secretary of the Army acting  
through the Chief of Engineers pursuant to Section  
103 of the Marine Protection, Research and Sanc-  
tuaries Act of 1972 (*86 Stat. 1052; P.L. 92-532*);

City of Nome

Post Office Box 281

Nome, Alaska 99762

is hereby authorized by the Secretary of the Army:  
to place approximately 1,477,000 cubic yards (cy)

of fill to construct an onshore storage area and roadway system, an offshore storage area-barge berthing facility, an earth-filled pier connecting the onshore and offshore facilities, and to monitor the project in accordance with the attached monitoring program. Approximate dimensions for the structures are as follows:

a. A 3,575' long x 85' wide (crown) x 16' above sea level (ranging from 16' to approximately 50' deep) fill for a pier, which will be protected with approximately 10-15' of armor rock; side slopes would be 1.5:1;

b. a 250' wide x 800' long x 40' deep fill for a general cargo storage area will be constructed at the seaward terminus of the pier; a 15' layer of armor rock will protect the 1.5:1 side slopes, the dock structure will consist of 30' diameter concrete caissons, 31' on center with grated connections;

c. a 520' long x 100' wide marshalling yard will connect the proposed barge docking facility and a future phase II oil rig service marshalling area adjacent to "b" above;

d. a 1,200' long x 450' x 9' deep fill for an onshore storage pad west of the pier road; a 26' crown width road, with 4:1 side slopes will surround the storage pads; and

e. a 2,400' long x 52' x 9' to 16' (variable) deep fill for a road system will connect the offshore storage area to the pier; the following components comprise this road system;

1. The western spur will be an approximately 260' long x 16' wide x 8'-11' (variable) deep fill, with 4:1 side slopes;

2. the northeastern spur will be an approximately 530' long x 40' wide x 6' deep fill with 2:1 side slopes;

this spur will run from the northeast terminus to a central tangent point;

3. a 140' long x 16' x 6' deep spur, with 2:1 side slopes, running southeast from the northeast spur (in "2" above) to the beach;

4. a 400' long x 52' wide x 4'-10' (variable) deep fill for a road, with 4:1 side slopes, from the shoreline to the southeast corner of the onshore storage pad; and

5. an 800' long x 52' x 4'-10' (variable) deep fill for a road with 4:1 side slopes, running north of the juncture point (in "4" above) along the east side of the storage pad approximately 370' past the northeast corner of that pad.

Breakdown of the fill types and quantities are as follows:

a. Dredge tailings for the pier and terminal facilities core—700,000 cy;

b. 300,000 cy of quarry rock for the pier and terminal facilities filter;

c. 254,000 cy quarry rock for the pier and terminal facilities armor slope protection;

d. 63,000 cy of dredge tailings for the road system between the onshore storage pad and the pier;

e. 93,000 cy non-frost susceptible dredge tailings for the onshore storage pad;

f. 24,000 cy of dredge tailings for the road system between the onshore storage pad and the pier; and

g. 10,000 cy of non-frost susceptible dredge tailings for the onshore road system.

in Norton Sound, sections 26 and 27, T. 11 S., R. 34 W., K.R.M. at Nome, Alaska in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (*on drawings, give file number or other definite identification marks.*)

"PROPOSED: CONSTRUCT PORT FACILITIES;  
IN: NORTON SOUND; AT: NOME, ALASKA;  
APPLICATION BY: CITY OF NOME; DATED:  
OCTOBER 2, 1982; 7 SHEETS; PORT OF NOME  
LITTORAL DRIFT MONITORING AND SHORE  
PROTECTION PROGRAM, MAY 4, 1984; ALSO  
SUBJECT TO ADEC SPECIAL CONDITIONS."

subject to the following conditions:

I. *General Conditions:*

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act (33 U.S.C. 1344), the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92-532, 86 Stat. 1052), or or pursuant to applicable State and local law.



c. That when the activity authorized herein involves a discharge during its construction or operation, or any pollutant (*including dredged or fill material*), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized in a manner so as to minimize any degradation of water quality.

g. That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in

reasonable accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

j. That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

k. That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7. -

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not completed on or before — day of —, 19—, *(three years from the date of issuance of this permit*



*unless otherwise specified*) this permit, if not previously revoked or specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Conditions hereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms

and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

u. That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

II. *Special Conditions: (Here list conditions relating specifically to the proposed structure or work authorized by this permit):*

a. That the permittee shall dredge the breach and entrances to the design depth (8 feet below MLLW), when deposition has reduced the design depth to a depth of 3 feet below MLLW. The permittee shall contact the District Engineer (D.E.) prior to performing any dredging of the breach and entrances. The dredged material shall be placed at a site approved by the D.E. . The breach and entrances shall be kept open or maintained over the life of the project.

b. That the permittee shall implement the approved Littoral Drift Monitoring program prior to the construction of the causeway or any related structure. This monitoring program shall continue for the life of the project, unless determined otherwise by the D.E. .

c. That should the D.E. determine, through the monitoring program, that a significant shoreline erosion is occurring the permittee shall be required to develop and implement a shoreline protection program to the satisfaction of the D.E. .

The following Special Conditions will be applicable when appropriate:

**STRUCTURES IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES:**

a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

c. That if the display of lights and signals on any structure work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

e. Structure for Small Boats: That permittee hereby recognizes the possibility that the structure

permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

#### MAINTENANCE DREDGING:

a. That when the work authorized herein includes maintenance dredging, it may be performed under this permit for \_\_\_\_\_ years from the date of issuance of this permit (*ten years unless otherwise indicated*);

b. That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

#### DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES:

a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR 230;

b. That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.

c. That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution.

#### DISPOSAL OF DREDGED MATERIAL INTO OCEAN WATER:

a. That the disposal will be carried out in conformity with the goals, objectives, and requirements

of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220-228.

b. That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

/s/ Larry L. Larson

7/16/84

City Manager Permittee & Title

BY AUTHORITY OF THE SECRETARY OF  
THE ARMY:

/s/ John R. Staser

7/25/84

JOHN R. STASER

CPT, Corps of Engineers, Acting Chief, Regulatory  
Branch FOR: DISTRICT ENGINEER,  
U.S. ARMY, CORPS OF ENGINEERS, Colonel Neil  
E. Saling

Transferee hereby agrees to comply with the terms  
and conditions of this permit.

\_\_\_\_\_  
TRANSFEEEE

\_\_\_\_\_  
DATE



**APPENDIX L**

**DEPARTMENT OF THE ARMY  
ALASKA DISTRICT CORPS OF ENGINEERS  
ANCHORAGE, ALASKA, 99506**

Regulatory Branch  
Permit Processing Section

PERMITTEE: City of Nome

EFFECTIVE DATE: Sept. 13, 1990

REFERENCE NO. Q-820546  
Norton Sound 36

**DEPARTMENT OF THE ARMY  
PERMIT MODIFICATION**

Department of the Army (DA) permit No. 2-820546, Norton Sound 36, was issued to the City of Nome on July 25, 1984, and subsequently modified on October 28, 1987, October 26, 1988, September 8, 1989, and October 27, 1989, for the placement of fill material to construct a causeway at Nome, Alaska.

The permit is hereby modified to include the following additional work:

“place a 10-inch-diameter, effluent outfall line in the causeway. The outfall diffuser would be located 400 linear feet south and east of the causeway terminus.”

If the activity authorized herein is not completed within 3 years of the date of this letter, the authorization of this modification, if not previously revoked or specifically extended, shall automatically expire.

All other terms and conditions of the original permit remain in full force and effect.

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This authorization and the enclosed modified plans should be attached to the original permit. Plan sheets 1, 4, and 6 of 11 of DA permit No. 2-890302, Norton Sound 57 (attached), are hereby incorporated by reference into this modification.

By Authority of the Secretary of the Army:

/s/ Timothy R. Jennings  
TIMOTHY R. JENNINGS  
Chief, Northern Unit  
Permit Processing Section

Enclosure

[Enclosure Omitted]



## APPENDIX M

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
Office of Management and Budget  
Division of Governmental Coordination

April 11, 1988

Steve Cowper, Governor

Central Office

P.O. Box AW  
Juneau, Alaska 99811-0165  
Phone: (907) 465-3562

Southeast Regional Office

431 North Franklin  
P.O. Box AW, Suite 101  
Juneau, Alaska 99811-0155  
Phone: (907) 465-3562

Southcentral Regional Office

2600 Denali Street  
Suite 700  
Anchorage, Alaska 99503-2795  
Phone: (907) 274-1581

Northern Regional Office

675 Seventh Avenue  
Station H  
Fairbanks, Alaska 99701-4596  
Phone (907) 456-3084

Mr. Alan Powers  
Regional Manager  
Alaska OCS Region  
Minerals Management Service  
949 East 36th Avenue  
Anchorage, AK 99508-4302

Dear Mr. Powers:

The State of Alaska has reviewed the Minerals Management Service's (MMS) request for comments and nominations for a mining lease sale in Norton Sound. The state is actively participating in the federal-state-local coordination team effort to help prepare the Norton Sound lease sale Environmental Impact Statement (EIS). Accordingly, the state will be submitting information and reviewing the EIS at several stages during its development.

## Available Data and Literature

The state has submitted (or will shortly) the following information for MMS's use during EIS preparation:

[Document List Omitted]

## *Assumptions for EIS Modeling*

The state has also reviewed the assumptions MMS is using for the EIS. These were distributed at the first coordination team meeting. We recommend changes to the assumptions regarding dredge size and predicted area of disturbance. It is probable that either smaller or larger dredge(s) than those stated in the MMS assumptions will be utilized for mining. MMS also assumes that the area dredge each year will be 60 acres year per dredge. This assumption however is based on current nearshore operations (BIMA) and does not fully consider that aerial disturbance will be a function of both dredge size and the depth dredge. It is probable that in future years a 120 acre/year per dredge disturbance may occur. (Additionally, please note that this is a permit imposed limitation.) The state recommends that MMS prepare mining scenarios with both "low" and "high" assumptions regarding dredge size and bottom disturbance. A model should be developed for a low, high and mid-point dredge size and bottom disturbance scenario.

We also recommend that in addition to estimating bottom disturbance in terms of acres, that the amount of cubic yardage disturbed and the depth of disturbance be noted. These two additional parameters will aid in estimating potential mining related impacts.

*Proposed Lease Sale Deletions*

Subsequent to the construction of the Nome causeway, the State of Alaska executed a waiver of claims to additional submerged lands based on the use of causeways to delimit Alaska's seaward boundary, unless a court of competent jurisdiction finds that the U.S. does not have the legal authority to require such a waiver. The state intends to file an appropriate action to resolve this issue, and in the meantime, respectfully requests MMS to delete the disputed acreage from the lease sale. The enclosed protraction sheets delineate the disputed 1082.16 acres.

*Conclusion*

The state looks forward to continued cooperation with MMS through the coordination team process. We will continue to provide MMS with information and review of the lease sale EIS, based upon our knowledge and experience with the offshore mining industry. Please call me or Barbara Sheinberg at 465-3562 if you have any questions regarding the state's comments or recommendations.

Sincerely,

/s/ Robert L. Grogan  
ROBERT L. GROGAN  
Director

Enclosure

cc: Members of Alaska-OCS Mining Program  
Coordination Team

[Enclosure Omitted]

APPENDIX N

STATE OF ALASKA  
DEPARTMENT OF LAW  
Office of the Attorney General

Steve Cowper, Governor

REPLY TO:

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- ✓ P.O. Box K—State Capitol  
Juneau, Alaska 99811-0300  
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FAX: (907) 463-5295

May 22, 1990

Honorable Donald P. Hodel  
Secretary of the Interior  
Department of the Interior  
C & 18th Streets, N.W.  
Washington, D.C. 2-0249-0000

Re: Notice of intent to file suit

Dear Secretary Hodel:

Pursuant to 28 U.S.C. § 2409a(m), the State of Alaska hereby gives notice that it intends to file suit to quiet title to a tract of submerged land in Northwest Alaska. For ease of reference, the tract is referred to as the "Port of Nome tract." A full legal description of the tract is enclosed as Exhibit A, and

the tract is generally depicted on the enclosed territorial sea boundary diagram, Exhibit B.

In general terms, the Port of Nome tract consists of the submerged lands which are more than three miles from the natural shore line but within three miles of the low water line on a solid fill causeway which serves as a dock for the City of Nome. Such a causeway ordinarily constitutes an extension of a state's coast line for delimiting that state's three-mile grant under the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 et seq. See, e.g., *United States v. Louisiana*, 389 U.S. 155, 158 (1967).

Because of objections by the United States Attorney General and the Solicitor of the Department of the Interior, however, the Corps of Engineers refused to issue a permit for construction of the causeway until the State of Alaska waived any claims to additional submerged lands which it might make as a result of the causeway's construction. On May 9, 1984, the state filed a conditional disclaimer to additional submerged lands to satisfy the Attorney General's and Solicitor's objections, a copy of which is enclosed as Exhibit C.

At the same time, Alaska contended that the Corps of Engineers did not have the legal authority to require such a disclaimer as a condition precedent to the issuance of a permit and, in the absence of such a disclaimer, to deny a permit solely on the basis of the Attorney General's and the Solicitor's objections. See 1980 Inf. Op. Att'y Gen. (Oct. 30; 663-80-0477), a copy of which is enclosed as Exhibit D. Any dispute over submerged land ownership which might arise as a result of causeway construction is not one of the factors which the Corps of Engineers is to consider as part of its public interest review process. Indeed, 33

C.F.R. 320.4(g) provides in part: "The dispute over property ownership will *not* be a factor in the Corps public interest decision." (Emphasis added.) *Also see Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 566-71 (D. Mass. 1987), appeal dismissed 841 F.2d 440 (1st Cir.), *cert. denied sub nom. City of New Haven v. Mass.*, 109 S. Ct. 128 (1988) (the Corps of Engineers' authority to consider economic impacts in its public interest review is limited to those economic effects caused by the project's impacts on the physical environment); *Missouri Coalition for the Environment v. Corps of Engineers*, 678 F. Supp. 790, 802 (E.D. Mo. 1988), *aff'd* 866 F.2d 1025, 1033-34 (8th Cir. 1989) (the Corps of Engineers is not to make political decisions as to which entity's economic interests ought to be preferred, citing *Mall Properties, Inc.*).

As a result, the disclaimer filed by the state provided in part: "This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require a disclaimer before issuing a permit for a project which might affect the coastline." Alaska intends to seek such a determination in a quiet title action with respect to the Port of Nome tract.

Having notified you of Alaska's intention to file suit and the basis therefore, and having provided you with a description of the lands to be included in the suit, we have satisfied the notice requirements of 28 U.S.C. § 2409a(m) for filing a quiet title action 180 days after you receive this letter.

This notice is not intended to delay or otherwise adversely affect the proposed offshore mining lease



sale near Nome, and preparation for that sale should continue. The Port of Nome tract, however, should either be deleted from any proposed offshore mining lease sale pending resolution of the ownership question or be the subject of an agreement under section 7 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1336, and Alaska Statute 38.05.027. This would allow the tract to be leased with the revenues placed in escrow pending final resolution of the ownership issue.

We naturally would like to resolve these matters without resort to litigation. If you or members of your staff have any suggestions for resolution without litigation, please contact us at your convenience.

Sincerely yours,

Douglas B. Baily  
Attorney General

By: /s/ G. Thomas Koester  
G. THOMAS KOESTER  
Assistant Attorney General

GTK:tg

Enclosures [4]

cc w/encls.:

Allen D. Powers, Regional Director  
Alaska OCS Region

U.S. Army Engineer, Alaska District

OCS Survey Group MD 625

P.O. Box 25165

Denver, Colorado 80225

Michael W. Reed, Attorney  
General Litigation Section  
United States Department of Justice

Lennie Gorsuch, Commissioner  
Department of Natural Resources

John Katz, Special Counsel  
State/Federal Relations

Robert Grogan, Director  
Div. of Governmental Coordination

Jim Spargo  
Coastal Boundary Section, DNR/ANC

John Briscoe, Esq.

[Enclosures B-D Omitted]

## PORT OF NOME

A tract of tide and submerged land described by Universal Transverse Mercator (U.T.M.), NAD 1927, grid bearings and distances, located within Township 12 South, Range 34 West, Sections 8, 14, 15, 16 and 17, Kateel River Meridian, Alaska, as generally depicted on the State of Alaska Territorial Sea Boundary Diagram for said township and range and more particularly described as follows:

Beginning for reference at the unmonumented northeast corner of protracted Township 12 South, Range 34 West, thence South  $25^{\circ}26'40''$  West 4863.394 meters to the true point of beginning for this description, thence 2601.530 meters along a curve concave to the north with a radius of 5556 meters, and a radius point at U.T.M. coordinates North 7,151,924.352 East 478,970.694, thence 3254.734 meters along a curve concave to the north with a radius of 5556 meters, and a radius point at North 7,151,927.511 East 478,955.925, thence South  $76^{\circ}10'59''$  East 90.108 meters, thence South  $75^{\circ}11'42''$  East 540.049 meters, thence South  $73^{\circ}56'35''$  East 330.015 meters to a curve, thence 347.774 meters along said curve being concave to the north with a radius of 5556 meters, and a radius point at U.T.M. coordinates North 7,153,125.790 East 477,452.600, thence South  $75^{\circ}44'11''$  East 347.717 meters, thence South  $77^{\circ}31'46''$  East 770.826 meters to a curve, thence 2.936 meters along said curve being concave to the north with a radius of 5556 meters, and a radius point at U.T.M. coordinates North 7,152,959.340 East 478,205.240, thence South  $77^{\circ}33'34''$  East 525.560 meters, thence South  $75^{\circ}32'35''$  East 157.259 meters to a curve, thence 1920.311 meters along said curve being concave to

the north with a radius of 5556 meters, and a radius point at U.T.M. coordinates North 7,152,345.360 East 480,169.310, thence 112.647 meters along a curve concave to the north with a radius of 5556 meters, and a radius point at U.T.M. coordinates North 7,152,338.830 East 480,221.320, thence South  $71^{\circ}03'10''$  East 69.696 meters, thence South  $70^{\circ}30'29''$  East 445.587 meters to a curve, thence 69.950 meters along said curve being concave to the north with a radius of 5556 meters, and a radius point at U.T.M. coordinates North 7,151,882.300 East 481,954.850, thence South  $71^{\circ}09'28''$  East 230.294 meters to the true point of beginning.

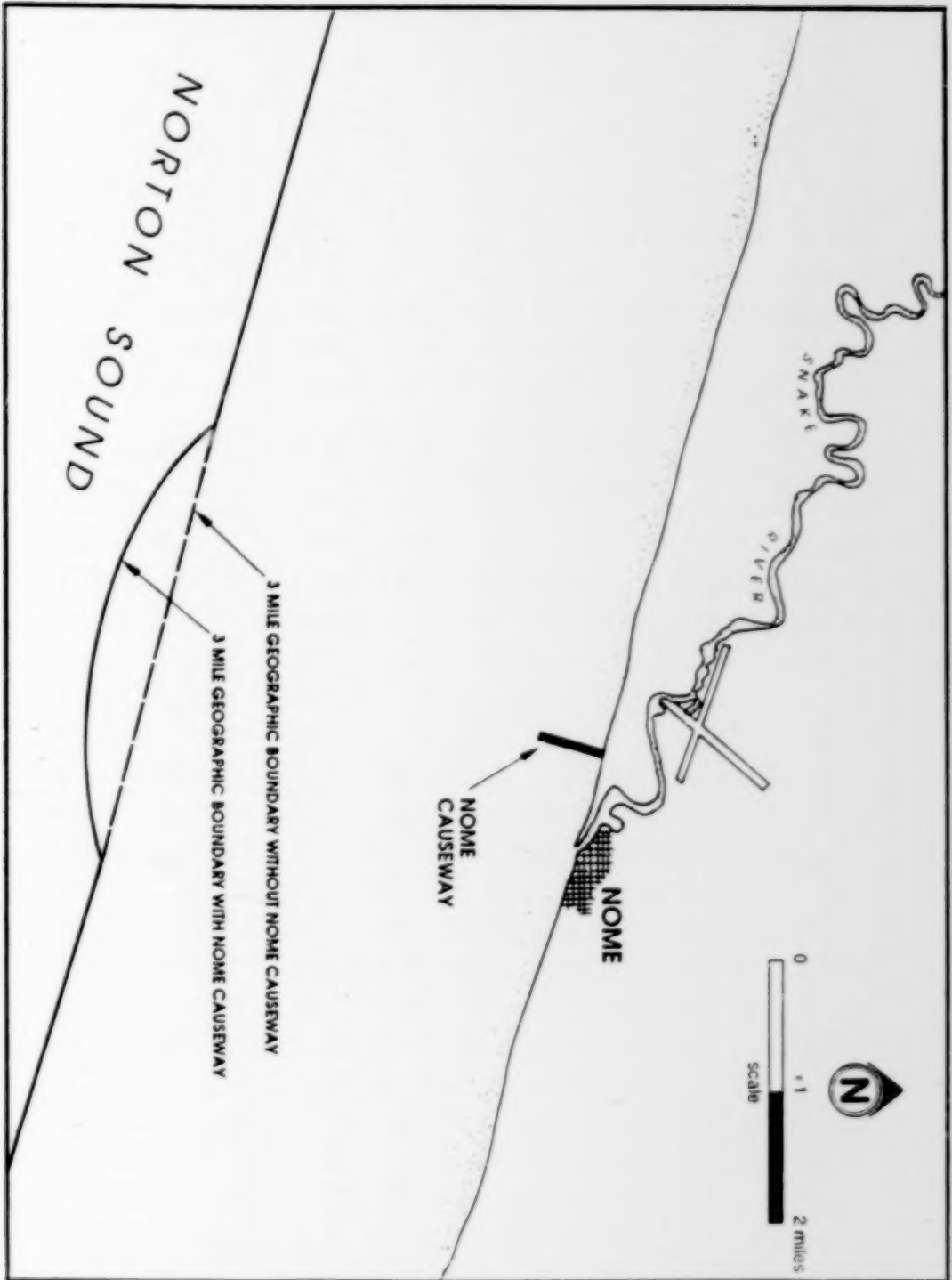
This tract contains 2,953,085.62 square meters (approximately 730 acres) more or less.

Exhibit A

Page 1 of 1

("Port of Nome")

APPENDIX O







**In the Supreme Court of the United States**

OCTOBER TERM, 1991

---

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

---

ON BILL OF COMPLAINT

---

**MOTION OF THE  
UNITED STATES FOR SUMMARY JUDGMENT  
AND  
BRIEF FOR THE UNITED STATES  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

---

KENNETH W. STARR  
*Solicitor General*

BARRY H. HARTMAN  
*Acting Assistant Attorney General*

EDWIN S. KNEEDLER  
*Assistant to the Solicitor General*

JEFFREY P. MINEAR  
*Assistant to the Solicitor General*

MICHAEL W. REED  
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Washington, D.C. 20530  
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---

### **QUESTION PRESENTED**

Whether the Secretary of the Army may decline to issue a permit for construction of an artificial addition to the coast line unless the coastal State agrees that the construction will be deemed not to alter the location of the federal-state boundary.



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# **In the Supreme Court of the United States**

OCTOBER TERM, 1991

---

No. 118, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF ALASKA

---

*ON BILL OF COMPLAINT*

---

## **MOTION OF THE UNITED STATES FOR SUMMARY JUDGMENT**

---

The United States of America, by its Solicitor General, moves for entry of summary judgment in its favor in this case. The United States initiated this action to quiet title to certain offshore submerged lands beneath Norton Sound, near Nome, Alaska. The State of Alaska has asserted a claim to those lands under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, on the basis that the City of Nome has constructed port facilities projecting into Norton Sound that extend the coast line and alter the federal-state boundary. The United States submits that Alaska has waived all such claims through a disclaimer that it executed in connection with the Secretary of the Army's issuance of a federal permit, under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, for construction

of the Nome port facilities. Alaska answers that the disclaimer is invalid as a matter of law.

The United States and the State of Alaska have filed a joint stipulation of facts with this Court, and there is no disputed issue as to any material fact. The controlling legal issue is whether the Department of the Army had legal authority to decline to issue the Section 10 permit unless Alaska executed the disclaimer. For the reasons set forth in the accompanying brief, the United States submits that the Department of the Army may refuse to issue a Section 10 permit on account of the effects of the proposed construction on the location of the federal-state boundary and that the Department lawfully declined to issue the permit for the Nome facilities until Alaska executed a disclaimer preserving that boundary. The disclaimer, accordingly, is valid, and the United States is entitled to judgment as a matter of law.

The United States therefore requests that this Court enter a judgment declaring that the City of Nome's construction of its port facilities did not alter the State of Alaska's entitlement to submerged lands in Norton Sound.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

OCTOBER 1991

**In the Supreme Court of the United States**

OCTOBER TERM, 1991

---

No. 118, Original

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF ALASKA

---

*ON BILL OF COMPLAINT*

---

**BRIEF OF THE UNITED STATES  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

---

**JURISDICTION**

On January 7, 1991, the United States requested leave to commence this original action. On April 1, 1991, the Court granted the United States' motion for leave to file a bill of complaint. On May 31, 1991, the State of Alaska filed its answer. On September 6, 1991, the United States and the State of Alaska filed a joint stipulation of facts. The jurisdiction of this Court rests on Article II, Section 2, Clause 2 of the Constitution of the United States, and 28 U.S.C. 1251(b)(2).

**STATUTE AND REGULATIONS INVOLVED**

Section 10 of the Rivers and Harbors Appropriation Act of 1899 provides in pertinent part as follows:

(1)

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any \* \* \* structures in any \* \* \* water of the United States \* \* \* except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge \* \* \* unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. 403.

The Department of the Army's regulations governing the issuance of Section 10 permits provide in pertinent part as follows:

(a) *Public Interest Review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. \* \* \* All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. \* \* \*

\* \* \*

(f) *Effects on limits of the territorial sea.* Structures or work affecting coastal waters modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law.

\* \* \* Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will \* \* \* request [the Solicitor's] comments concerning the effects of the proposed work on the outer continental rights of the United States.

\* \* \* The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

33 C.F.R. 320.4.

#### STATEMENT

The United States seeks to quiet title to certain submerged lands beneath Norton Sound, near Nome, Alaska. The State of Alaska has asserted a claim to those lands under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which grants to the States ownership of submerged lands from the coast line to a point, in most cases, three geographical miles seaward thereof. Alaska bases its claim on the fact that the disputed lands are within three geographical miles of the ordinary low-water mark of certain port facilities that the City of Nome has constructed. The United States submits that Alaska has waived all such claims through a disclaimer that it executed in connection with the Secretary of the Army's issuance



of a federal permit, under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, for construction of the Nome port facilities. Alaska contends that the Secretary of the Army lacked authority to insist that Alaska execute the disclaimer and that the disclaimer accordingly is invalid as a matter of law.

#### A. Federal/State Ownership of Submerged Lands

1. The discovery of offshore petroleum and mineral deposits at the turn of this century led to litigation between the United States and the coastal States over ownership of offshore submerged lands. The State of California asserted that it owned all submerged lands, and the related mineral resources, within three miles of its coast. This Court rejected that contention in the landmark case of *United States v. California*, 332 U.S. 19 (1947) (*California I*). The Court ruled that "the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil." *Id.* at 38-39. See 332 U.S. at 805 (Order and Decree).

2. Following this Court's decision in *California I*, Congress comprehensively addressed the question of resource development of offshore submerged lands. In 1953, Congress enacted the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which, as a general matter, grants the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. 1311. The Act generally defines the "seaward boundary" of each State "as a line three geographical miles distant from its coast line." 43 U.S.C. 1312. It defines the "coast

line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c).

Also in 1953, Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, which confirms the United States' authority to exercise jurisdiction and control over all submerged lands lying seaward of the lands granted to the States under the Submerged Lands Act. 43 U.S.C. 1331(a), 1332. Congress described those lands as the "outer Continental Shelf," 43 U.S.C. 1331(a), and declared that it is "the policy of the United States that"—

the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

43 U.S.C. 1332(1). Congress has further declared that the outer Continental Shelf

is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.

43 U.S.C. 1332(3). Congress also has prescribed various policies and requirements for coordinating activities on the outer Continental Shelf and sharing resource revenues with the States. See, *e.g.*, 43 U.S.C. 1332, 1333(a), 1337(g).

3. The United States and the State of California subsequently invoked the principles set forth in the Submerged Lands Act and the Outer Continental Shelf

Lands Act in addressing California's offshore ownership interests. The ensuing litigation involved various disputes over the application of the Submerged Lands Act, including the question whether man-made structures, such as jetties and harborworks, alter the "coast line" for purposes of the Submerged Lands Act. See 43 U.S.C. 1301(c). This Court subsequently concluded, upon recommendation of the Special Master, that man-made additions are to be treated as part of the coast line. *United States v. California*, 381 U.S. 139, 176-177 (1965) (*California II*). In doing so, however, the Court cited the Special Master's conclusion that "the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes could thus be the subject of agreement between the parties." *Id.* at 176. Accord *United States v. Louisiana*, 394 U.S. 11, 40 n.48 (1969); compare *United States v. California*, 447 U.S. 1 (1980) (*California III*) (structures, such as open piers, that lack a low water mark, do not extend the "coast line").

**B. The Secretary of the Army's Authority to Regulate the Placement of Structures in Navigable Waters**

1. The Submerged Lands Act generally "relinquished" the United States' ownership interests in submerged lands that are within three miles seaward of the coast line, 43 U.S.C. 1311, but it expressly retained "all [of the United States'] navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. 1314. As one aspect of its powers of "regulation and

control," the United States strictly supervises the placement of artificial structures in navigable waters.

Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, restricts such structures in three ways. First, Section 10 imposes a *complete* prohibition on the placement of "any obstruction" in the waters of the United States, except as authorized by Congress:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; \* \* \*.

Second, Section 10 prohibits the erection of "any structures" in the waters of the United States except as the Secretary of the Army allows:

[A]nd it shall not be lawful to build or commence the building of any \* \* \* structures in any \* \* \* water of the United States \* \* \* except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; \* \* \*.

Third, Section 10 prohibits the commencement of "work" altering conditions of any harbor, canal, lake, or like waters unless the Secretary of the Army consents:

[A]nd it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge \* \* \* unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Thus, Section 10 amounts to a general prohibition on the placement of any obstruction in coastal waters,

but empowers the Secretary of the Army to make exceptions for the building of structures and undertaking of work affecting those waters. See *United States v. Republic Steel Corp*, 362 U.S. 482, 486-487 (1960).

2. Section 10 does not specify what factors the Secretary of the Army should take into account in determining whether to authorize the placement of a structure or undertaking of work in the waters of the United States. In these circumstances, the Secretary has determined that the Department of the Army should consider all factors relevant to the public interest in determining whether such construction or work should go forward. He has therefore adopted, by regulation, a permitting process based on a "public interest review." See 33 C.F.R. 320.4. The Army's regulations state at the outset:

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.

33 C.F.R. 320.4(a)(1). The regulations further provide:

All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. 320.4(a)(1).



The Army's regulations address in greater detail a number of those factors, 33 C.F.R. 320.4(b)-(r), including, of particular relevance here, the "Effects on limits of the territorial sea," 33 C.F.R. 320.4(f). The latter provision begins by observing that under *California II*:

Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law.

Thus, the regulation recognizes the central role that the coast line plays in determining the location of the Nation's international and federal-state boundaries.<sup>1</sup> The regulation then provides:

Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of

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<sup>1</sup> At the time the Secretary adopted the regulation, the "territorial sea" described the area three miles seaward of the coast line. 33 C.F.R. 329.12. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 n.8 (1989). Since that time, the President has proclaimed that the United States claims a territorial sea extending 12 nautical miles seaward of the coast line for purposes of international law. See *ibid.*; Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (1989). That Proclamation, however, does not affect the location of the federal-state boundary, which remains defined by the Submerged Lands Act as a line three miles seaward of the coast line, 43 U.S.C. 1312. See 54 Fed. Reg. 777 (stating that nothing in the Proclamation "extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom").



the Department of the Interior is required before final action is taken.

33 C.F.R. 320.4(f). Accordingly, the regulation requires the Army Corps of Engineers to request comments from the Solicitor "concerning the effects of the proposed work on the outer continental rights of the United States," although the final decision on the application is made "by the Secretary of the Army after coordination with the Attorney General." 33 C.F.R. 320.4(f). See also 33 C.F.R. Pt. 322 (prescribing additional requirements for Section 10 permits); 33 C.F.R. Pt. 325 (setting forth procedures for processing permits).

### **C. The Present Dispute**

The facts surrounding the present dispute are set forth in the joint stipulation (J.S.) filed by the United States and the State of Alaska in this case. The contents of the joint stipulation can be summarized as follows:

1. In 1982, the City of Nome, Alaska, filed an application with the Department of the Army, Alaska District Corps of Engineers (the Corps), for a permit to construct port facilities, including a causeway extending into Norton Sound. J.S. 2, 1a-10a. The Corps issued a public notice and invited comments, see 33 C.F.R. 325.3, in accordance with the Army's public interest review procedures. J.S. 2, 11a-16a. The Alaska Office of the Department of the Interior's Minerals Management Service filed an objection to the issuance of a permit on the ground that the port facilities would constitute an artificial accretion to the legal coast line. J.S. 2, 17a-19a.

The Corps requested comments from the Solicitor, in accordance with 33 C.F.R. 320.4(f), quoted above.

J.S. 2, 20a-21a. The Solicitor responded that construction of the Nome facility would "move Alaska's coastline or baseline seaward of its present location" and that "[f]ederal mineral leasing off-shore Alaska would be affected because the state-federal boundary, as well as international boundaries, are measured from the coastline or baseline." J.S. 2-3, 22a. The Solicitor therefore recommended that "approval of the permit application be conditioned upon Alaska executing an agreement or a quit claim deed preserving the coastline and the state-federal boundary." J.S. 3, 22a.

The Corps transmitted the Solicitor's letter to the Alaska Department of Natural Resources and stated that a Department of the Army permit would not be issued to the City of Nome unless Alaska executed a waiver or quit claim deed preserving the coast line and the state-federal boundary. J.S. 3, 24a. The Alaska Department of Natural Resources submitted a conditional disclaimer stating in pertinent part:

Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operations of the Nome port facility. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

J.S. 3, 30a. Paragraph 4 provided that the disclaimer "becomes ineffective and without force and effect" if a court determines that "the Corps of Engineers does not have the legal authority to re-

quire such a disclaimer before issuing a permit for a project which might affect the coast line." J.S. 4, 30a-31a. The Department of Justice informed the Corps that Alaska's disclaimer satisfied any objections that the Departments of Justice and the Interior might have to the issuance of the permit. J.S. 4, 32a.

The Corps issued a statement of findings supporting the issuance of the permit pursuant to the Department of the Army's public interest review criteria, and it issued a validated permit on July 25, 1984. J.S. 4-5. 33a-37a, 39a-49a. The City of Nome subsequently constructed the port facility, which includes a causeway extending approximately 2700 feet from the coast line into Norton Sound. J.S. 5, 62a.

2. In 1988, the Minerals Management Service published a request for comments and nominations for a proposed lease sale for hard-rock minerals, including gold, in the Norton Sound area. 53 Fed. Reg. 8134. The State of Alaska submitted comments stating, among other things, that the proposed sale involved submerged lands subject to the Nome project disclaimer and that the State intended to file a legal action, in accordance with paragraph 4 of the disclaimer, challenging the Corps' authority to require a waiver of rights to submerged lands. J.S. 5, 52a-54a. Alaska subsequently provided notice, pursuant to 28 U.S.C. 2409a(m), of its intention to file a suit to quiet title to the submerged lands in Norton Sound that are more than three miles from the natural shoreline but within three miles of the low water line of the constructed, solid-fill Nome causeway. J.S. 6, 55a-59a. Although the Nome causeway is only 85 feet wide and 2700 feet long (occupying about 5 acres), it has placed in dispute approximately 730

acres of submerged lands. J.S. 5, 6, 60a-61a. See J.S. 62a (map showing disputed acreage).

The United States thereafter requested and was granted leave by this Court to commence this original action. The Minerals Management Service published a final leasing notice soliciting bids, 56 Fed. Reg. 28,656 (1991), and the United States and Alaska entered into an agreement directing the revenues from leasing of the disputed acreage into an escrow account for payment to the United States or Alaska depending on the outcome of this action.<sup>2</sup>

### SUMMARY OF ARGUMENT

Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, confers broad authority on the Secretary of the Army to regulate the placement of structures and the commencement of related work in coastal waters. The Secretary has properly concluded that the decision whether to allow such structures or work should be based on a "public interest review," 33 C.F.R. 320.4(a), which takes into account a range of factors, including the effect of the structure on the "limits of the territorial sea," 33 C.F.R. 320.4(f). In this case, he determined that the Nome port facilities would have such an effect, and he lawfully declined to issue a Section 10 permit until the State of Alaska executed a disclaimer preserving the existing federal-state boundary.

A. The Secretary may properly conduct a "public interest review" to determine whether to issue a Sec-

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<sup>2</sup> The bidding process closed and no bids were received. The United States and Alaska agree, however, that a live controversy remains, in light of their continuing disagreement as to the location of the federal-state boundary and the prospect of future lease sales in the area. J.S. 6-7.

tion 10 permit. Section 10 does not specify what factors the Secretary should consider in issuing such a permit. It is therefore reasonable for the Secretary to consider all factors relevant to the public interest in order to ensure a sound and fully informed exercise of his discretion. The Secretary has considered such factors for more than half a century. His adoption of a formal process for public interest review ensures that Section 10 permits are issued consistently with the policies that Congress has set forth in other laws.

B. The Secretary may properly consider, as part of his public interest review, the effects of a coastal structure on the "limits of the territorial sea." A structure that alters the coast line may substantially alter the Nation's international and federal-state boundaries, affecting the United States' vital national interests in the outer Continental Shelf. There is no reason to believe that Congress, sub silentio, required the Secretary to ignore those important federal interests when deciding whether to issue a Section 10 permit. Indeed, the Secretary's consideration of those interests in the permitting process is consistent with this Court's decisions, which contemplate that such matters will be considered before a federal permit is issued.

C. The Secretary lawfully declined to issue a Section 10 permit in this case until the State of Alaska issued a disclaimer preserving the existing federal-state boundary. The Secretary's public interest review revealed that the Nome port facilities would alter the coast line and impair the United States' interests in the outer Continental Shelf. The Secretary was entitled, on that basis, to deny a Section 10 permit. He therefore could lawfully insist that the



State of Alaska execute a disclaimer, preserving existing rights, as a less drastic alternative to an outright denial of the permit.

### ARGUMENT

**THE SECRETARY OF THE ARMY MAY DECLINE TO ISSUE A PERMIT FOR CONSTRUCTION OF AN ARTIFICIAL ADDITION TO THE COAST LINE UNLESS THE COASTAL STATE AGREES THAT THE CONSTRUCTION WILL BE DEEMED NOT TO ALTER THE LOCATION OF THE FEDERAL-STATE BOUNDARY**

The Secretary of the Army has long considered the "public interest" in determining whether to issue a permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899. As one aspect of the inquiry, the Secretary may consider whether the placement of a structure in coastal waters will affect the location of the federal-state boundary. The Secretary properly concluded, after consultation with the Solicitor of the Department of the Interior, that the Nome port facilities would have such an effect, and he lawfully declined to issue the Section 10 permit unless the State of Alaska executed a disclaimer preserving the existing federal-state boundary.

**A. The Secretary may consider the public interest in determining whether to issue a permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899**

1. When a court reviews an agency's construction of a statute that the agency administers, the court must first inquire "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute "is



silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In this case, Section 10 plainly prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress" to the navigable capacity of the United States' coastal waters. 33 U.S.C. 403. Just as plainly, Section 10 empowers the Secretary of the Army to authorize the placement of "structures" including port facilities, and the undertaking of excavation, fill and other work, in such waters. 33 U.S.C. 403. Section 10 is silent, however, as to what factors the Secretary should consider in determining whether to authorize such structures or work. Thus, the initial question for this Court is whether the Secretary's use of a "public interest review," 33 C.F.R. 320.4(f), "is based on a permissible construction of the statute." *Chevron U.S.A. Inc.*, 467 U.S. at 843. Clearly it is.

Congress has elected to impose a complete prohibition on the creation of "any obstruction" in navigable waters. 33 U.S.C. 403. It has then given the Secretary of the Army, who is charged with executing the law, the power to allow exceptions on a case-by-case basis, where the structure or work is recommended by the Corps of Engineers. 33 U.S.C. 403. But Section 10 neither specifies the factors the Secretary must consider in deciding whether to authorize construction in coastal or other waters nor limits the range of factors he may deem relevant. Section 10, on its face, therefore commits the identification of relevant factors to the discretion of the Secretary of the Army. Compare *Jay v. Boyd*, 351 U.S. 345, 353-354 (1956).

In particular, nothing in Section 10 confines the Secretary to considering only those factors that bear on the navigable capacity of the waters involved. Nor should any such limitation be implied. Section 10 does not confer a right to obtain a permit for construction or fill in covered waters, such that the Secretary may deny a permit only if he finds an adverse impact on navigation or other specified factors to be present. Rather, as noted above, Section 10 states a flat prohibition ~~against~~ obstructions not "affirmatively authorized" by Congress itself, and provides for exceptions to that prohibition only where affirmatively authorized by the Secretary.

Because Congress itself obviously could consider all matters bearing on the public interest in deciding whether to authorize a project in the manner referred to in the first clause of Section 10, the logical inference is that the Secretary, too, may consider various factors he deems relevant to the public interest in exercising his delegated power under the second and third clauses to create exceptions to the prohibition in the first clause. This inference is reinforced by the specification that the Secretary's determination under the latter two clauses is to be based upon the "recommendation" of the Chief of Engineers, which strongly suggests that authorization need not be granted unless the Secretary affirmatively finds that the proposed project is, on balance, meritorious and commends itself to approval. Cf. *Webster v. Doe*, 486 U.S. 592, 600 (1988). Thus, as the Fifth Circuit observed, when it appears that a proposed project in covered waters would be contrary to the public interest, "nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see." *Zabel v. Tabb*, 430 F.2d 199, 201

(5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). See *id.* at 207-208. Compare *Udall v. FPC*, 387 U.S. 428, 450 (1967) (applying a "public interest" standard to hydropower licensing decisions).

A comparison with Section 13 of the 1899 Act, 33 U.S.C. 407, further reinforces the conclusion that the Secretary is not narrowly confined under Section 10 of the same Act to considering only factors bearing on navigation. Section 13 provides that the Secretary "may permit" the discharge of "refuse" whenever "in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby." 33 U.S.C. 407. As this Court explained in *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973), "even in a situation where the Chief of Engineers concedes that a certain deposit will not injure anchorage and navigation, the Secretary need not necessarily permit the deposit, for the proviso makes the Secretary's authority discretionary—*i.e.*, it provides that the Secretary 'may permit' the deposit." *Id.* at 662. The Court further pointed out that Section 13 "contains no criteria to be followed by the Secretary in issuing such permits." *Id.* at 668. The Court's reasoning in *Pennsylvania Industrial Chemical Corp.* applies equally to the contemporaneously enacted Section 10, which commits the authorization of a structure or other work in covered waters to the Secretary's discretion, and does not specify criteria (such as those pertaining only to navigation or anchorage) that must be followed by the Secretary in exercising that discretion.<sup>3</sup>

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<sup>3</sup> The Secretary no longer issues Section 13 permits, in light of the superseding permit program established under the Clean Water Act, 33 U.S.C. 1251 *et seq.* See 33 U.S.C. 1342(a) (5); 33 C.F.R. 320.2(d).

If there could be any remaining doubt about the permissibility of the Secretary's interpretation and implementation of Section 10, it is eliminated by the rule of construction adopted by this Court in *United States v. Republic Steel Corp.*, 362 U.S. at 491. There, the Court concluded that "[t]he philosophy of the statement of Mr. Justice Holmes in *New Jersey v. New York*, 283 U.S. 336, 342, that 'A river is more than an amenity, it is a treasure,' forbids a narrow, cramped reading either of § 13 or of § 10" of the 1899 Act. The Secretary's public interest review, which he has applied to all Section 10 permit applications for more than two decades, furthers that understanding of Section 10.

2. The breadth of the Secretary's authority that is indicated by the statutory text Congress enacted in 1899 is confirmed by subsequent developments. This Court suggested, more than 50 years ago, that the Secretary has discretion to consider public interest criteria when issuing a Section 10 permit. The issue arose in *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933). The relators in that case sought permission from the Secretary to build a wharf projecting from the Virginia shore into the Potomac River. The Secretary refused to authorize the construction solely on the ground that it would be inimical to the establishment of the proposed George Washington Parkway. *Id.* at 353-355.

The relators petitioned for a writ of mandamus to compel the Secretary to authorize the wharf, arguing that the Secretary had a mandatory duty to issue a Section 10 permit unless the proposed structure interfered with navigation. The lower courts denied the petition, concluding that the Secretary had discretion to deny a Section 10 permit for reasons other

than navigational concerns. The court of appeals stated:

[T]he act confers discretion in the Secretary to grant or refuse permits where the structure will not interfere with navigation, and the Secretary in the exercise of that discretion may take into consideration the character of the structure sought to be built \* \* \*, and in the determination of this matter the Secretary must take into consideration the "location" and the "condition" of the structure and its effect upon other structures or upon the "channel," or the normal flow of the stream.

*United States ex rel. Greathouse v. Hurley*, 63 F.2d 137, 141 (D.C. Cir. 1933).

This Court affirmed. It took note of the Secretary's arguments that

petitioners' riparian ownership and the right to build the wharf which they claim to be derived from it are doubtful; and in any event that the duty of the Secretary under the statute is not plain and certain, since the words forbidding all structures in any navigable water "except on plans recommended by the Chief of Engineers and authorized by the Secretary of War," are only permissive, not mandatory, and there is no plain implication of a duty on the part of the Secretary to authorize a structure \* \* \* to which there is substantial objection that it infringes the rights or obstructs the public policy of the United States as owner and sovereign of the river bed.

289 U.S. at 358-359. The Court, however, found no need to "say what effect should be given to these objections alone, whether considered each separately or



together.” *Id.* at 359. It observed that the allowance of mandamus “is controlled by equitable principles,” and that “the relief sought by mandamus should be denied here, even if petitioners’ title to the upland adjacent to the river and their right to build the wharf were less doubtful than they are.” *Id.* at 359-360.

Although this Court’s decision in *Greathouse* did not conclusively resolve the issue presented here, it correctly observed that the petitioners’ right to a permit was, at best, “doubtful.” Indeed, as the D.C. Circuit recognized, 63 F.3d at 141, and the Fifth Circuit has since stated:

[T]he Corps of Engineers does not have to wear navigational blinders when it considers a permit request. That there must be a reason [for denying a permit] does not mean that the reason has to be navigability.

*Zabel*, 430 F.2d at 208. See also *Deltona Corp. v. United States*, 657 F.2d 1184, 1187-1188 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982); *Bankers Life & Casualty Co. v. Callaway*, 530 F.2d 625, 633-634 (5th Cir. 1976); *United States v. Joseph G. Moretti, Inc.*, 478 F.2d 418, 423 (5th Cir. 1973); *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 104-105 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

3. As the dispute in *Greathouse* indicates, the Secretary of the Army has long considered non-navigational interests in determining whether to issue a Section 10 permit. Those interests have become far more numerous and important in the latter half of this century. The Secretary must now act in the face of an extensive body of federal law establishing, among other things, national policies concerning en-



vironmental matters and natural resource development.<sup>4</sup>

The Secretary has responded by adopting the "public interest review" process to keep pace with the evolution of the law. As the Department of the Army's regulations explain:

Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program has evolved to one involving the consideration of the full public interest by balancing the favorable impacts against the detrimental impacts. \* \* \* The program is one which reflects the national concerns for both the protection and utilization of the important resources.

33 C.F.R. 320.1. See 42 Fed. Reg. 37,122 (1977); 39 Fed. Reg. 12,115 (1974); 33 Fed. Reg. 18,670 (1968). See also H.R. Rep. No. 917, 91st Cong. 2d Sess. 5 (1970) (praising the Army's use of public interest review factors).

The Secretary of the Army's adoption of a process for "public interest review" reflects a commitment to faithful execution of the law. An administrative agency, like a court, has a duty to reconcile "laws enacted over time" and to "get[] them to 'make

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<sup>4</sup> See, e.g., Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*; Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*; Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431 *et seq.*; Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*; Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*; Submerged Lands Act, 43 U.S.C. 1301 *et seq.*; Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* See also 33 C.F.R. 320.3 (describing other related laws).

sense' in combination," *United States v. Fausto*, 484 U.S. 439, 453 (1987), and to implement its statutory authority in a manner that takes account of changed circumstances and its accumulated experience and expertise. See, e.g., *American Hosp. Ass'n v. NLRB*, 111 S. Ct. 1539, 1546-1547 (1991); *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990).

That is what the Secretary of the Army has attempted to do here. See *Zabel*, 430 F.2d at 209. The Secretary has appropriately chosen to codify by regulation a process that conforms the agency's exercise of discretion to new legal requirements. That process also takes into account evolving evidence and awareness of matters affecting—and affected by—activities in navigable waters. It thus ensures that the Department's issuance of a Section 10 permit is consistent with the policies that Congress has set forth in other laws and with the inherently evolutionary nature of a regulatory program. Cf. *Shepard v. NLRB*, 459 U.S. 344, 351 (1983).

Moreover, the Secretary of the Army has found that the "public interest review" process is, in practice, an effective method for fulfilling its Section 10 responsibilities. It allows federal *and* state agencies, as well as the general public, to raise important legal and policy issues bearing on the issuance of a Section 10 permit. In this case, for example, the public interest review revealed important considerations bearing on the protection of fish and wildlife resources, shoreline erosion, historic preservation, and other matters, and it allowed the Secretary of the Army to tailor his authorization of the proposed project to meet those concerns. See J.S. 33a-37a. It has served that salutary purpose in a host of other

projects in the course of the Secretary's review of thousands of permits annually. In short, the Secretary's public interest review is a useful, sensible and lawful approach to issuance of Section 10 permits and improves the overall regulatory effort.

**B. The Secretary may refuse to issue a Section 10 permit for a coastal structure based on the effects of the structure on the location of the federal-state boundary**

1. The Secretary of the Army's public interest review regulations expressly provide for consideration of a wide variety of factors.<sup>5</sup> This case arises from the consideration of one particular factor—the effects of the proposed construction on the “limits of the territorial sea.” 33 C.F.R. 320.4(f). Since 1969, the Secretary's regulations have provided that Section 10 permit applications for structures or work affecting coastal waters will be reviewed specifically to determine whether the coast line or base line might be altered. 33 C.F.R. 320.4; see 33 C.F.R. 209.120 (d)(4) (1969). That consideration is a proper subject of the Secretary's public interest review.

As the Secretary's regulation recognizes, the location of the coast line has great significance. The Convention on the Territorial Sea and the Contiguous

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<sup>5</sup> See 33 C.F.R. 320.4(b) (wetlands); 33 C.F.R. 320.4(c) (fish and wildlife); 33 C.F.R. 320.4(d) (water quality); 33 C.F.R. 320.4(e) (historic, cultural, scenic, and recreational values); 33 C.F.R. 320.4(g) (property ownership); 33 C.F.R. 320.4(h) (coastal zones); 33 C.F.R. 320.4(i) (marine sanctuaries); 33 C.F.R. 320.4(j) (other federal, state, or local requirements); 33 C.F.R. 320.4(k) (safety of impoundment structures); 33 C.F.R. 320.4(l) (floodplain management); 33 C.F.R. 320.4(m) (water supply and conservation); 33 C.F.R. 320.4(n) (energy conservation and development); 33 C.F.R. 320.4(o) (navigation); 33 C.F.R. 320.4(p) (environmental benefits); 33 C.F.R. 320.4(q) (economics); 33 C.F.R. 320.4(r) (mitigation).

Zone, ratified by the United States on April 12, 1961, 15 U.S.T. 1608, establishes international boundaries by reference to the coast line (or base line).<sup>6</sup> In addition—and especially pertinent here—the Outer Continental Shelf Lands Act and the Submerged Lands Act provide that the offshore boundary for purposes of federal and state interests shall be determined by reference to the coast line. See pp. 4-5, *supra*. This Court's 1965 decision in *California II* established that man-made additions to the coast line, which are treated as part of the coast line for the purposes of the Convention (Art. 8, 15 U.S.T. at 1609), should be treated as such for purposes of those Acts. Thus, it is entirely appropriate for the Secretary to consider the effect a coastal structure would have on the location of the coast line as part of the Section 10 public interest review.

Completely apart from any issue that might arise with respect to foreign relations, see *California I*, 332 U.S. at 29, such review is necessary to protect an important federal interest—"the outer continental rights of the United States." 33 C.F.R. 320.4(f). Congress has expressly declared that "the outer Continental Shelf is a vital *national* resource reserve held by the *Federal Government* for the *public*." 43 U.S.C. 1332(3) (emphasis added). If the Secretary is forbidden from taking into account the effect that coastal structures may have on the coast line, portions of that "vital national resource reserve" would be transferred—without public comment or any formal governmental consideration—from national to state hands. That transfer would prejudice the rights of

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<sup>6</sup> See also United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982). The United States has not ratified that Convention, but has recognized that its base-line provisions reflect customary international law.

the national citizenry, in violation of the express policy of the Outer Continental Shelf Lands Act, in favor of citizens of a single coastal State. Section 10 of the 1899 Act should not be construed to require a result so at odds with its overriding purpose of protecting important national interests. Accordingly, the Secretary of the Army, in consultation with the Solicitor of Interior and the Attorney General, may refuse to issue a permit that would have such an effect. 33 C.F.R. 320.4(f).

2. The Secretary's consideration of the effect of a coastal structure on the coast line also conforms to and implements this Court's decision in *California II*. As we have explained, the Court agreed with the Special Master in *California II* that coastal structures may be treated as part of the "coast line" for purposes of the Submerged Lands Act. See 381 U.S. at 176-177. See pp. 5-6, *supra*. A central element of Court's *ratio decidendi* was that

the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes could thus be the subject of agreement between the parties.

381 U.S. at 176. The Special Master had specifically observed that

it may be assumed that in the past the question of the ownership of the lands, minerals and other things underlying these artificial accretions has not been taken into consideration by the United States in passing judgment upon whether the accretions will be permitted; but it seems clear that in the future that aspect of the matter can be, and probably will be, taken into account.



*California II*, Report of the Special Master, at 46. The Court agreed, stating:

Arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters.

381 U.S. at 177. Thus, the Court effectively endorsed the Special Master's view that the United States could protect the paramount national interests at stake by revising its Section 10 permitting process, which is the means by which the United States "pass[es] judgment upon whether the accretions will be permitted." Report of the Special Master, at 46. See also *United States v. Louisiana*, 394 U.S. at 40 n.48.

The Department of the Army promptly amended its permitting process to implement the solution offered by the *California II* decision. The Department formally revised its Section 10 regulations in 1968 to require consideration of "the impact on the base line from which to measure the width of the three-mile belt of submerged land given to the States by the Submerged Lands Act." 33 Fed. Reg. 18,670, 18,671 (1968). Since that time, the Department has further refined those regulations. See 39 Fed. Reg. 12,115 (1974). And since as early as 1970, it has entered into numerous agreements, like the one involved here, to resolve or pretermitt questions regarding the effect of a coastal structure on the location of the coast line and the federal-state boundary. J.S. 7.<sup>7</sup> There is no basis in Section 10 for the Court, at

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<sup>7</sup> See Joint Lodging of the United States and the State of Alaska (providing copies of various disclaimers).



this late date, to reject this established method for ensuring protection of the United States' vital national interests in the outer Continental Shelf, as part of the Secretary's broader public interest review.

**C. The Secretary lawfully declined to issue a Section 10 permit in this case unless the State of Alaska executed a disclaimer preserving the federal-state boundary**

1. The Department of the Army properly exercised its regulatory authority in this case. When the City of Nome applied for a Section 10 permit, the Alaska District of the Department of the Army's Corps of Engineers sought public comment in accordance with 33 C.F.R. 325.3. The Alaska Office of the Department of the Interior's Minerals Management Service objected to the issuance of the permit on the ground that it would affect the coast line and, consequently, the United States' offshore interests. The Corps therefore consulted with the Solicitor of Interior in accordance with 33 C.F.R. 320.4(f). J.S. 2, 20a-21a. Such consultation is, of course, entirely permissible and, in fact, desirable.

2. The Solicitor objected to Nome's application for a Section 10 permit based on a valid federal concern:

The proposed construction would move Alaska's coastline or baseline seaward of its present location. Federal mineral leasing offshore Alaska would be affected because the state-federal boundary, as well as international boundaries, are measured from the coastline or baseline.

J.S. 22a. As subsequent events have shown, the Solicitor's concerns were well founded. The Minerals Management Service has determined that the affected offshore acreage may contain valuable mineral deposits. J.S. 5, 6; 53 Fed. Reg. 8134 (1988); 56 Fed. Reg. 28,656 (1991). The Solicitor correctly antici-

pated that Alaska might raise a claim to those lands as a result of construction of the Nome port facility. See J.S. 5-6, 52a-54a, 55a-61a.

3. The Solicitor recommended that "approval of the permit application be conditioned upon Alaska executing an agreement or a quit claim deed preserving the coastline and the state-federal boundary," noting that "[s]uch agreements have been encouraged by the Supreme Court, and have been entered into by other states as well as Alaska." J.S. 22a-23a. The Solicitor was entitled, like any participant in the Corps' process, to make such a suggestion, and the Corps was entitled to weigh his recommendation in its permitting decision.

4. The Corps informed the City of Nome and the State of Alaska of the Solicitor's objection, and it reasonably insisted, in light of the Solicitor's recommendation, that a permit would not be issued

until an agreement has been reached between the Alaska Department of Natural Resources and the City of Nome, and a waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary.

J.S. 24a. The Corps acted lawfully in insisting on such a disclaimer. As we have explained, Section 10 of the Rivers and Harbors Appropriation Act of 1899 does not require the Secretary of the Army to issue a permit for coastal construction that is inimical to the public interest—including the United States' interest in the outer Continental Shelf. See pp. 15-28, *supra*. If the Secretary of the Army can legitimately prohibit the construction of the proposed port facilities, he can certainly provide the City of Nome and the State of Alaska with a less drastic "alternative to that prohibition" that satisfies the government's

regulatory objective. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-837 (1987).

5. In this case, the State of Alaska elected to execute a binding disclaimer stating that "the state does not, and will not, treat the Nome port development as extending its coast line for purposes of the Submerged Lands Act." J.S. 30a. Alaska reserved, as the sole condition to the disclaimer, its right to challenge the Secretary's "legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line." J.S. 30a-31a. As we have shown, the Secretary of the Army has such legal authority. The disclaimer is therefore valid, and the United States is entitled to judgment as a matter of law.

#### CONCLUSION

The motion for summary judgment in favor of the United States should be granted.

Respectfully submitted.

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OCTOBER 1991



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF ALASKA,

*Defendant.*

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Brief *Amicus Curiae* of the States of:

ALABAMA, CALIFORNIA, DELAWARE, FLORIDA, GEORGIA,  
HAWAII, LOUISIANA, MASSACHUSETTS, MISSISSIPPI,  
NEW JERSEY, NORTH CAROLINA, SOUTH CAROLINA,  
TEXAS, VIRGINIA, AND WASHINGTON,

Joined by the  
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## QUESTIONS PRESENTED

Did Congress authorize the Army Corps of Engineers, acting with the U.S. Departments of the Interior and Justice, to deny the issuance of a permit for a coastal project, regardless of the sponsor of that project, until the coastal State in which the project is located disclaims its rights under the Submerged Lands Act to any additional State submerged lands that may result if the project causes an extension of the coastline?

May the Army Corps of Engineers, acting with the Departments of Interior and Justice, make a blanket determination that coastal jetties, groins, causeways and other structures are not "in the public interest" if their effect is to cause an extension of a State's seaward boundary?

Did Congress authorize the Army Corps of Engineers, acting with the U.S. Departments of the Interior and Justice, to deny coastal States the benefit of an enhanced seaward boundary caused by an artificial modification of the coastline even though the federal government may take advantage of such an artificial accretion in order to extend its own outer continental shelf lands?

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IN THE  
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OCTOBER TERM, 1991

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF ALASKA,

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---

Brief *Amicus Curiae* of the States of:

ALABAMA, CALIFORNIA, DELAWARE, FLORIDA, GEORGIA,  
HAWAII, LOUISIANA, MASSACHUSETTS, MISSISSIPPI,  
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Joined by the  
COASTAL STATES ORGANIZATION  
IN SUPPORT OF DEFENDANT

---

STATEMENT OF INTEREST OF AMICI STATES  
and the  
COASTAL STATES ORGANIZATION  
IN THE OUTCOME OF THIS CASE

The fifteen States joining this brief *amicus curiae* ring the country. Their economies to a great extent depend upon their ports and harbors, their beaches and shores. The central facts of this case pertain to a new port facility constructed in Nome, Alaska, specifically a solid fill causeway extending 2,700 feet perpendicularly from the natural

coastline of Alaska. But the outcome of this case will have far-reaching implications, well beyond the City of Nome and State of Alaska, affecting all coastal projects that modify a State's natural shoreline.

The Coastal States Organization is an association of delegates of the Governors of the 35 coastal States, Commonwealths and Territories. Charged with advancing the interests and rights of the coastal States in coastal and marine affairs, the Coastal States Organization has coordinated the development of this *amicus* brief. The scope of interests of the Coastal States Organization, as well as its member States, includes the construction of ports and harbors, shoreline erosion control, rail and road highway systems, tourism and beach nourishment projects, all of which are affected by this case.

Over ninety-nine percent (99%) by weight of the overseas trade of the United States is carried by ship through U.S. ports.<sup>1</sup> A significant amount of domestic trade is also handled between coastal ports. As a result, all around the country port facilities are being constructed, modernized and improved. Causeways, artificial islands and jetties must be installed to link the Nation's highways and railways with waterborne commerce. With very few exceptions, nearly every port in the United States services this vessel traffic from such artificial landfills, harbor works, islands, causeways and other man-made improvements in the shoreline. The Nation's interstate and

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<sup>1</sup> *U.S. Merchandise Trade, Selected Highlights*, Dec. 1990. Report FT 920, U.S. Department of Commerce, Bureau of the Census. Table 1, pg. 1, Table 6, pg. 16.

foreign commerce, conducted in a fiercely competitive international environment, depend directly upon the effective development and management of the coastal States' ports and harbors.

Much of the waterborne commerce is foreign oil which must be imported to fulfill the Nation's energy needs. As the United States seeks to curb the demand for foreign oil, we look harder and harder for domestic sources. Thus, offshore of Alaska, California, Texas, Louisiana, Alabama and Florida intensive exploration is occurring for offshore oil and gas. To find, develop and produce these offshore resources -- vital to the national interest -- fill must often be placed in the navigable waterways to construct permanent causeways for the exploration and production platforms, and the landing terminals shoreside.

At the same time, many Americans, in their "pursuit of happiness" enjoy the beaches and coasts of the country. Thus, it is no surprise that over 60 percent of Americans live in the coastal areas of the country.<sup>2</sup> Tourism, based on their beaches and shores, is a vital industry in many of the coastal States. But a major, and constant, problem of the coasts is erosion. Erosion threatens private property and the public's beaches without discrimination. In the never-ending battle against beach and shore erosion, revetments, groins, breakwaters and seawalls are being installed. Eroded beaches are often replenished and renourished with additional sand.

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<sup>2</sup> Coastal States Organization, *America's Coasts*, 1986, at 6.

This case raises questions of national importance that link these otherwise disparate activities together, for each of these activities -- port development, highway and rail construction and maintenance, offshore energy production and erosion control -- requires a permit from the Army Corps of Engineers issued pursuant to 33 C.F.R. Part 320, which includes a "public interest review" of the project.

The general question before this Court is whether Congress authorized the United States Army Corps of Engineers (Army Corps) to require a State to waive its rights under the Submerged Lands Act of 1953 (43 U.S.C. 1301 - 1315) as a pre-condition to issuing a permit to construct an artificial structure, whether that be a causeway, artificial island, seawall or beach nourishment project, which would modify the natural coastline from which the State's three-mile seaward boundary is measured. All State parties to this *amicus* brief have a vital interest in the Court's answer to this question.

To the best of our knowledge, this challenge of 33 C.F.R. § 320.4(f) is a case of first impression. We know of no other federal court case challenging the legitimacy of this provision of the U.S. Code of Federal Regulations.

## BACKGROUND STATEMENT

A. The delineation of a State's three-mile seaward boundary.

In simple terms, a State measures its three-mile seaward boundary from the "coast line" in accordance with the



Submerged Lands Act.<sup>3</sup> The "coast line" generally follows the "line of ordinary low water." See 43 U.S.C. 1301(c). Clearly, however, the "coast line" of the country must necessarily jump across the mouths of bays and rivers. Waters inside the "coast line" are inland waters.

In the congressional deliberations over the passage of the Submerged Lands Act, it became clear that agreement on the definition of "inland waters," *i.e.* where to draw the "coast line" across these bays and rivers, was likely to impede passage of the legislation. See *U.S. v. California*, 381 U.S. 139, 152 (1965). In the end, when enacting the Submerged Lands Act of 1953, Congress neither accepted nor rejected any rule or formula for addressing this problem, and left the task of defining "inland waters" to the courts. *Id.* at 150-152, 157, 164.

About a decade later, in 1964, the United States ratified the Convention on the Territorial Sea and Contiguous Zone, T.I.A.S. 5639, 15 U.S.T. (Pt. 2) 1606 (1958) (Territorial Sea Convention), which established the principles for delineating the seaward territorial boundaries of the

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<sup>3</sup> The States of Florida and Texas have historic boundaries in the Gulf of Mexico extending three marine leagues (nine geographic miles) from their coastlines. See *U.S. v. Louisiana*, 363 U.S. 1 (1960). Florida, on its Atlantic Ocean side, has a statutory three-mile seaward boundary, the same as the other *amici* States and Alaska. Regardless of whether a State has an historic or statutory boundary, however, the Army Corps requires a waiver of rights under the Submerged Lands Act. Thus, the Army Corps indiscriminately requires a State to sign such a waiver, causing the inherent delays in the issuance of the necessary permit.

signatory countries. This convention provided that a country's territorial sea boundary would be measured from a "baseline" that, like the Submerged Lands Act's "coast line," generally follows the line of ordinary low water. *Id.*, art. 3.

This Court has recognized the Territorial Sea Convention as "the best and most workable" solution to the problems of delimiting the State submerged lands. In its 1965 decision in *U.S. v. California*, this Court held that the territorial sea baseline established in accordance with the convention also delineates the "coast line" for purposes of the Submerged Lands Act. 381 U.S. 139, 165. This Court's purpose was to establish a "single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations ... " *Id.*, 381 U.S. at 165. The Territorial Sea Convention also establishes that the boundaries of a country's territorial sea are ambulatory, and may be modified by natural changes in the coastline, as well as artificial accretion. See T.I.A.S. 5639, 15 U.S.T. (Pt. 2, art. 8) 1606, 1608 (1958). This Court has held that the ambulatory nature of boundaries as allowed by the Convention applies equally to the delineation of State seaward boundaries. See *U.S. v. California*, 381 U.S. 139, 177 (1965); *U.S. v. California*, 432 U.S. 40, 41 (1977); *U.S. v. Louisiana*, 389 U.S. 155, 158 (1967); and *U.S. v. California*, 447 U.S. 1 (1980).

Thus, again in simple terms, a State locates its seaward boundary by measuring three geographic miles from the "baseline" from which the U.S. territorial sea is measured. The ease and beauty of this methodology is that the baseline from which the coastal States measure their three-mile seaward boundaries, the baseline from which

the United States measures its territorial sea boundary, and the baseline from which the United States measures the seaward boundary of the U.S. Exclusive Economic Zone remain one and the same. This result, a common baseline for measuring both State and Federal seaward boundaries, as intended by this Court, is however, frustrated by the Army Corps' policy of requiring States to waive their rights to an extended seaward boundary, while the federal government does not.

- B. The "Double Standard" imposed by the Army Corps' waiver requirement results in different baselines for measuring a State's seaward boundary and the federal seaward Territorial Sea and Exclusive Economic Zone boundaries.

In effect, the federal government is employing a double standard. The extended coastline created by artificial projects of the kind at issue creates a new baseline for measuring the outward limits of the U.S. territorial sea, the outer continental shelf, as well as a State's submerged lands. *United States v. California*, 381 U.S. 139, 148-149 (1965). See also Shalowitz, *Shore and Sea Boundaries* 157 (U.S. Dept. of Commerce 1975 ed.). No such waiver, however, is made by the federal agencies of the additional territory and outer continental shelf lands gained accordingly. While taking advantage of the extended baseline for purposes of its territorial sea and outer continental shelf boundaries, it attempts to deny the same extension to affected States. Having multiple baselines from which to measure both State and Federal seaward boundaries is, however, precisely what this Court sought to avoid when it applied the provisions of the Territorial Sea Convention to define the term "coast line" for purposes of the Sub-

merged Lands Act. See *U.S. v. Louisiana*, 389 U.S. 155, 165 (1967).<sup>4</sup>

C. The nine projects requiring waivers.<sup>5</sup>

The Joint Stipulation of Facts requires that the Parties prepare a compilation of permits and disclaimers-of-rights in the Army Corps permits, and to lodge this compilation with this Court. See Joint Stipulation, at 7. In addition to this compilation, the following summary of these nine projects is informative as to the kinds of projects that are involved, projects that range from large port development projects to fairly minor (in terms of "coast line" relocation) beach renourishment projects. This summary also shows the pervasive and all-inclusive nature of the federal policy at issue.

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<sup>4</sup> Of course, this Court has pointed out that Congress can, acting pursuant to the federal authority over navigable waters, protect itself against efforts by states to extend their seaward boundaries by making artificial changes to the shoreline. See *U.S. v. California*, *supra*, 381 U.S. at 177. None of these projects discussed in the next section, however, demonstrate such an intent by a State. The extension of the seaward boundary is merely incidental to the purpose of the projects.

<sup>5</sup> In addition to these waivers exacted from six states, the federal government is currently requiring the State of New Jersey to waive its rights under the Submerged Lands Act in connection with a beach replenishment project along the Atlantic Ocean in Loveladies, N.J. The State estimates that the project will increase the width of the present coastline by 50 feet. Thus, the boundary of the State would be extended three miles out by the same 50 feet. As of this date, the State has not signed this waiver.

Alaska: In addition to the Nome port project, the State was required to waive its rights in at least three other projects: for Sohio Alaska Petroleum Co to construct a causeway in the Beaufort Sea; for Standard Alaska Production Company, to construct a gravel fill causeway and enlarge an existing artificial island 1.25 miles off the coast at Heald Point in the Beaufort Sea, and for ARCO Alaska, to place gravel in waters of the United States. All three of these permits involved offshore oil production.

California: Two disclaimers have been exacted by the Army Corps. In 1970, the State waived its rights to submerged lands it would have received by virtue of an 8,800 foot freeway embankment in Ventura County, extending a maximum of 600 feet seaward. This project would have resulted in an additional four acres of submerged lands. The lands could have produced an estimated \$125,000 in mineral resources. The other permit pertained to a 900 foot rock groin constructed by Chevron, U.S.A. off of El Segundo, which would have resulted in 100 acres of submerged lands coming into State ownership. In response to objections by the federal government, the State waived its rights in 1983.<sup>6</sup>

Florida: A waiver was required by the Army Corps before it would issue a permit to Collier County, a coastal county

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<sup>6</sup> Sixteen other artificial structures, apparently constructed before the Corps adopted its offending policy, have been recognized by this Court for purposes of establishing the Federal/State boundary. See *U.S. v. California*, 432 U.S. 40, 41-42 (1977).



on the Gulf of Mexico. The permit was needed for a beach nourishment project to combat erosion. The State found that because charts were to be prepared that would permanently delineate the seaward historic boundary of the State of Florida (See *U.S. v. Florida*, 425 U.S. 791 (1976)) the boundary could not be extended by a beach nourishment project, and thus consented to signing the waiver. Nonetheless, additional delay in the issuance of the permit was the result.

Louisiana: A waiver was required by the Army Corps before a permit would be issued to the Louisiana State Department of Transportation and Development to install and maintain T-groins for erosion control. This action was necessary to protect a Louisiana State highway that was being threatened by coastal erosion.

North Carolina: The only known disclaimer for a coastal project arose in 1987, when the State Department of Transportation sought approval for an emergency project to protect a bridge span of N.C. Highway 12 between the Cape Hatteras National Seashore and Pea Island National Wildlife Refuge. This emergency project involved construction of a stone revetment extending 2,750 into the Atlantic Ocean to protect the bridge from erosion. The Army Corps conditioned its permit approval for this emergency project on the State waiving its rights under the Submerged Lands Act. If the State had refused the waiver, a project of national significance would have been delayed, if not prohibited outright.

South Carolina: Only one disclaimer has been required in the State, for a 1991 renourishment project to replenish the severely eroded shore at Folly Beach. South Carolina



was required by the Army Corps to waive its rights under the Submerged Lands Act even though the renourishment project would only temporarily extend the coastline a few hundred feet. In 1979, the beach at Hilton Head was renourished, at federal expense, and no waiver was required.

D. Local coastal projects provide national benefits, serve the "public interest," and should not be delayed.

The benefits of these local projects, whether it is the construction of a major port facility or a beach nourishment project, are national in scope. Indeed, this is recognized by the United States in the Alaskan disclaimers, wherein the federal government and the State of Alaska acknowledge that "both Statewide and nationwide benefits will be derived from ... increased employment, increased revenue generated, and enhanced economic opportunities in Northwestern Alaska and the adjacent outer continental shelf." Joint Stipulation of Facts, at 27a. A beach nourishment project can also provide national benefits, especially in view of the importance of recreation at the beaches, and the related tourism and economic growth. If these coastal projects can go forward in such a manner that navigation is not obstructed and the coastal and marine water quality is not diminished so as to cause harm to either human health or the environment, the public benefits provided by their completion is clearly in the "public interest."

Delaying, or denying, the construction or completion of these coastal projects would not serve the public interest, a fact that is likewise recognized by the U.S. Government. See Joint Stipulation of Facts, at 28a-29a. But that is

exactly the result of 33 C.F.R. § 320.4(f), regardless of whether the State has a three-mile statutory or nine-mile historic boundary. Approval of each project must be delayed while the Army Corps consults with the other federal agencies, and each State (and their many agencies) reviews the impact that the waiver would have on its seaward boundary, what resources are involved, and weighs the factors in order to determine if the State should waive its seaward boundary delineation rights under the Submerged Lands Act.

### SUMMARY OF ARGUMENT

The Army Corps is totally lacking in authority to withhold a permit for the construction of a coastal project because of the project's affect on a State's seaward boundary until the State has waived its statutory rights under the Submerged Lands Act. None of the three statutes upon which the Army Corps bases its authority to impose such a condition: the 1899 Rivers and Harbors Appropriations Act, the Clean Water Act, and the Marine Protection, Research and Sanctuaries Act, provide the basis to deny a permit based on a coastal project's affect on the location of a State's seaward boundary.

Congress set forth an orderly process for determining the boundary between a State's submerged lands and federal outer continental shelf by passing the Submerged Lands Act. Congress recognized that disputes may arise between the States and the federal government "as to whether or not lands are" State-owned submerged lands, or federally managed outer continental shelf lands. *See* 43 U.S.C.

1312. To resolve such disputes, Congress included within the Submerged Lands Act a specific provision delegating to the Secretary of the Interior the authority to negotiate a remedy for such disputes with the States. See 43 U.S.C. 1336. Since only Congress has the power to establish State boundaries (*U.S. v. Louisiana*, 363 U.S. 1, 35 (1960)) the Army Corps' actions have no independent validity, and are an unlawful infringement on this congressional delegation of authority to the Secretary of the Interior.

Within the Submerged Lands Act Congress expressly reserved certain paramount federal powers associated with commerce, navigation, national defense and international affairs. See 43 U.S.C. 1314. Requiring a State to waive its statutory rights under the Submerged Lands Act has no rational relationship to the exercise of any of these powers.

Further, Congress "determined and declared" that it is "in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States" be vested in the States. 43 U.S.C. 1311(a). Having so determined and declared, it is not for the Army Corps to reopen the question as to whether or not State ownership of certain submerged lands is in the "public interest."

## ARGUMENT

- A. 33 C.F.R. § 320.4(f) is beyond the Army Corps' statutory authority, is *ultra vires*, and thus is without any legal force and effect.

The sources of statutory authority upon which the Army Corps relies for 33 C.F.R. Part 320 are sections 9, 10, 11, 13, and 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401, 403, 404, 407 and 408); section 404 of the Clean Water Act (33 U.S.C. 1344) and section 103 of the Marine Protection, Research and Sanctuaries Act (33 U.S.C. 1413, commonly known as the Ocean Dumping Act). See 33 C.F.R. § 320.2 None of these statutes, taken jointly or separately, provide a congressional delegation of authority to the Army Corps to deny or condition a permit for a coastal project because of the effect such a project may have on the location of a State's seaward boundary.

1. The Rivers and Harbors Appropriations Act of 1899.

The "great design" of the Rivers and Harbors Act was to maintain and promote navigation. *U.S. v. Ohio Barge Line Inc.*, 458 F.Supp. 1086, 1091 (D.C.Pa. 1978), vacated on other grounds 607 F.2d 624 (1979). The "intent and purpose of (the Rivers and Harbors Act) was to insure free navigability of interstate commerce through the federal regulation" of navigable waters. *Minnehaha Creek Watershed Dist. v. Hoffman*, 449 F. Supp. 876 (D.C.Minn. 1978), *affirmed in part, reversed in part on other grounds*, *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (1979). See also *U.S. v. Sexton Cover Estates, Inc.*, 526 F.2d 1293 (C.A.Fla. 1976) ("Promoting and protecting navigation was the dominant theme of this chapter ..."); *U.S. v. Logan & Craig Charter Service, Inc.*, 676 F.2d 1216 (C.A.Mo. 1982) (Section 10 of Rivers and Harbors Act "was enacted to prevent private parties from obstructing navigable waters ..."). "Under section 10 of the Harbor Act ... the Army Corps has traditionally protected naviga-

tion by regulating the building of structures (piers, docks, etc.) within navigable waters as well as dredge and fill activities in such waters. Any proposed project which interferes with navigation has required a Army Corps Rivers and Harbors Act permit..... Starting in 1968, the Army Corps began to use its authority under the Rivers and Harbors Act to regulate activities within navigable waters which, while not necessarily obstructing navigation, would cause pollution." Citations omitted. *U.S. v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151, 1158 (1st. Cir. 1987).

The Rivers and Harbors Act "is within the power of Congress so far as navigation comes within the provisions of interstate commerce or within the admiralty and maritime jurisdiction." *U.S. v. Banister Realty Co.*, 155 F. 583 (1907). Congress passed the Rivers and Harbors Act to assure that the Nation's navigable waters would be free and clear of obstructions to navigation, in order to increase and enhance interstate and foreign commerce. This purpose has no rational relation to the location of a State's seaward boundary. To the best of our knowledge, the case law is devoid of any holding that the purpose of the Rivers and Harbors Act is in any way related to the location, delineation or determination of a State's seaward boundary.

## 2. The Clean Water Act.

"The objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In order to achieve this objective, Congress declared that "it is the national policy that the discharge of toxic pollutants



in toxic amounts be prohibited." 33 U.S.C. 1251(a)(3). Section 404 of the Clean Water Act, 33 U.S.C. 1344, implements the steps to achieve the national objective of restoring and maintaining the Nation's water quality by regulating by permit the discharge of dredged or fill material into the navigable waters of the United States. *See generally* 33 U.S.C. 1344.

The scope of the national objective of the Clean Water Act is the restoration and maintenance of the water quality of the Nation's navigable waters, an objective that has no rational relation to the location of a State's seaward boundary. To the best of our knowledge, the case law is devoid of any holding that the purpose of the Clean Water Act is in any way related to the location, delineation or determination of a State's seaward boundary.

### 3. The Ocean Dumping Act.

The transport and dumping of material into the ocean waters of the United States has been found by Congress to endanger "human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities." 33 U.S.C. 1401(a). To address this problem, Congress enacted the Ocean Dumping Act to "prevent or strictly limit the dumping into ocean waters" of materials. 33 U.S.C. 1401(b). Thus, the purpose of the Ocean Dumping Act is "to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean



waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States." 33 U.S.C. 1401(c).

The scope of the congressional purpose and intent in enacting the Ocean Dumping Act was to protect the human health and welfare, as well as the marine environment. These intents and purposes have no rational relation to the location of a State's seaward boundary. Once again, the case law appears devoid of any holding that the Ocean Dumping Act is in any way related to the location, delineation or determination of a State's seaward boundary.

4. No statutory basis exists for 33 C.F.R. 320.4(f).

In accordance with the 1899 Rivers and Harbors Appropriations Act, the Clean Water Act, and the Ocean Dumping Act, the Army Corps may deny a permit for the construction of a harbor facility if it is determined that the construction or facility would result in an obstruction to navigation, endanger human health or welfare, the marine environment, or the economic potential. None of these statutes, however, grant the Army Corps the authority to deny such a permit because of the effect that a construction project may have on the location of a State's seaward three-mile boundary.

Taken together, these three statutes embody Congress's clear intention of maintaining the Nation's waterways free from obstruction, and doing so in a manner that does not unreasonably diminish the quality of the navigable waters, endanger human health, safety or welfare, or harm the

coastal or marine environment. Neither jointly nor separately do these three statutes delegate to the Army Corps the authority to deny or condition a permit for a coastal project because of the effect such a project may have on the location of a State's seaward boundary.

To find the statute where Congress does clearly and specifically address the question of the seaward boundary between State submerged lands and Federal outer continental shelf, one must look not in Title 33 (Navigation and Navigable Waters) but in Title 43 (Public Lands), specifically to the Submerged Lands Act at 43 U.S.C. 1301 *et seq.*

- B. The Submerged Lands Act vests the coastal States with clear title and ownership of the submerged lands within three geographic miles of their coastlines. Inclusive within this ownership is the right to establish a baseline that reflects both natural and artificial modifications to the coastline from which to measure the three-mile boundary. Measuring the seaward boundary in this manner does not affect any paramount federal power. Any State / Federal seaward boundary disputes are to be addressed by the Secretary of the Interior, not the Army.

We do not question the constitutional authority of Congress to prevent the coastal States from unilaterally extending their coastlines or seaward boundaries.<sup>7</sup> We do

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<sup>7</sup> Certainly Congress did not contemplate that the coastal projects of local or private sponsors could be held hostage and denied unless the State in which they were located disclaimed

assert, however, that Congress has not exercised this authority through either the Rivers and Harbors Act, the Clean Water Act or the Ocean Dumping Act. Congress has spoken on this subject only in the Submerged Lands Act which expressly grants to the States "title to, and ownership of" the submerged lands out to three geographic miles from the States' coastline, while expressly reserving to the federal government certain paramount rights of commerce, navigation, national defense and international affairs. See 43 U.S.C. 1312, 1314.

1. This Court established the applicable rule of property in its construance of the Submerged Lands Act of 1953.

Since the formation of the Union by the thirteen original States, the States contended that their ownership extended seaward, generally to a distance of three miles offshore. In 1947, however, this Court held, in the case *U.S. v. California*, 332 U.S. 19, that the seaward boundary of a State's territory was the "low water mark." This ruling brought about great debate in Congress that extended from the "Seventy-fifth, Seventy-sixth, Seventy-ninth, Eightieth, Eighty-first, and Eighty-second Congresses." H. Rep. No. 695, reprinted in 1953 U.S. CODE, CONG. & ADMIN. NEWS 1396. In fact, "the longer it continue[d], the more vexatious and confused it [became]." *Id.* "Interminable litigation [arose] between the States and the

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any incidental benefits that might accrue as a result. Cf. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1988).

Federal Government, between applicants for leases ... and between the States and their lessees." *Id.*

Finally, in 1953, Congress enacted the Submerged Lands Act, wherein full title and ownership of the submerged lands was vested in the States. Seldom have the States so aggressively pursued their rights as they did when getting the Submerged Lands Act passed by Congress and signed into law by President Truman. These hard-won rights of the coastal States to the submerged lands off their coastline out to a three-mile seaward boundary as measured from an ambulatory coastline remain jealously guarded.

The Submerged Lands Act finally laid to rest the great debate, and provided that "The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line ..." 43 U.S.C. 1312. The term "coast line" is defined as meaning "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c).<sup>8</sup>

2. Artificial modifications of the coastline act to shift the State's seaward boundary.

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<sup>8</sup> For California, this line has been determined to be the lower low water line. See *United States v. California*, 381 U.S. 139 (1965); *United States v. California*, 447 U.S. 1, 6 (1980).

The Submerged Lands Act is silent as to whether artificial modifications of the coastline act to change the seaward boundary of a State. However, under this Court's interpretations of the Submerged Lands Act (and the related international treaties on the question) the three-mile seaward boundary must be measured from the baseline drawn along points on the low tide line of the State's coast. This baseline, as held by the Court, is drawn along the mean low tide line of the coastline as it has been changed and modified by both natural and man-made forces. *U.S. v. California*, 381 U.S. 139, 177 (1965) ("when a State extends its land domain by pushing back the sea ... its sovereignty should extend to the new land, as was generally thought to be the case prior to the 1947 *California* opinion."); *U.S. v. Louisiana*, 389 U.S. 155, 158 (1967) ("it is clear that in the case of the three-mile unconditional grant artificial jetties are a part of the coastline for measurement purposes"). See also *U.S. v. California*, 432 U.S. 40, 41-42 (1977).

This construction recognizes the desirability of a "single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations." *United States v. California, supra*, 381 U.S. at 165; *U.S. v. Louisiana*, 394 U.S. 11, 34 (1969). Nothing that Congress has done since these decisions were rendered negates their salutary affect.

It is this statutory right -- to measure a State's seaward boundary from an ambulatory coastline -- upheld by this Court, and part of the bundle of rights that the States fought so hard to obtain, that the Army Corps requires the States to waive as a condition for the necessary permit for the construction of ports, harbors, breakwaters,



causeways and other facilities that serve to increase, augment and enhance interstate and foreign commerce.

3. The ambulatory nature of baselines and seaward boundaries has been recognized by Congress.

It was clearly recognized by Congress when the Submerged Lands Act was passed that the coastline would be constantly modified and changed by man's actions. "Apart from the resources which may be taken from submerged lands, the States have other interests in the use of such lands. Many piers, docks, wharves, jetties, sea walls, groins, pipe lines, sewage-disposal systems, acres of reclaimed land and filled-in beaches, etc. have been established, *and many more will be established on these lands.*" H. Rep. N<sup>o</sup> 1778, *reprinted in* 1953 U.S. CODE, CONG. & ADMIN. NEWS, 1436. Emphasis added. Congress was also aware that natural changes constantly reformed the coastline. *Id.*, at 1424.

This Court has recognized that problems may arise due to the ambulatory nature of a State's coastline, from either natural or artificial causes. But, as this Court has noted, "if the inconvenience of an ambulatory coastline proves to be substantial, there is nothing in this decision which would obstruct resolution of the problems through appropriate legislation or agreement between the parties." *U.S. v. Louisiana*, 394 U.S. 11, 34 (1969).

The word "agreement," however, connotes negotiations. But the stark fact of the matter is that the Army Corps simply gave the City of Nome a "take-it-or-leave-it" proposition. Either the State waives its rights under the



Submerged Lands Act, or the Army Corps refuses to issue the permit. This is not negotiating an agreement, it is holding the permit hostage until the "disclaimer-of-rights" ransom is paid. This is the untenable position that the Army Corps puts all coastal States in whenever such a permit is needed for any "slight and sporadic changes which can be brought about artificially" to the coastline. *U.S. v. California*, 381 U.S. at 177. This injustice to the States (as well as the private or public sponsors of the project) at the hands of the Army Corps is exactly the outcome that was intended to be avoided by both Congress and this Court.

4. The paramount powers reserved to the federal government by the Submerged Lands Act are wholly unrelated to the location of a State's seaward boundary.

The Submerged Lands Act reserves to the federal government "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the *constitutional purposes of commerce, navigation, national defense, and international affairs*." 43 U.S.C. 1314(a). Emphasis added. But the Army Corps' requirement that a State must waive its statutory rights under the Submerged Lands Act because of the impact of a coastal project on the location of a State's seaward boundary does not further any of these paramount powers. The fact that a State's seaward boundary is changed by an artificial modification of the coastline in no way leads to any infringement, interference, diminishment or prohibition of any of the federal government's reserved, paramount powers.

- a. Neither commerce nor navigation are affected by the location of a State's seaward boundary.

Certainly the location of a State's invisible seaward boundary can in no way amount to an "obstruction" of navigation. Nor can it be seen as interfering with interstate or foreign commerce. Causing a delay in (or not allowing) the construction of a port, however, would interfere with the furtherance of interstate and foreign commerce. No real-world problem burdening modern shipping and navigation can be seen to arise due to the placement of a State's invisible seaward boundary a few hundred feet in one direction or another.

- b. Neither national defense nor international affairs are affected by the location of a State's seaward boundary.

The location of a State's seaward boundary has no relation to national security or defense. "This ownership in [a State] would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands precisely as it is over every river, farm, mine, and factory of the Nation." *United States v. California*, 332 U.S. 19, 42-43 (1947)(Justice Reed, dissenting). Nor could the shifting of a State's seaward boundary a few hundred feet possibly interfere with international affairs. Indeed, on the outer continental shelf, the United States possesses full jurisdiction, control, and power of disposition to the exclusion of any foreign power. See Pres. Proc. 2667 (1945) wherein President Truman proclaimed U.S. jurisdiction and control over the continental shelf apper-

taining to the United States. *See also* 43 U.S.C. 1331 *et seq.*, codifying proclamation 2667.

Also relevant is the fact that President Reagan, in 1988, extended the U.S. territorial sea out to 12 nautical miles for the primary purpose of advancing the national security interests of the United States. *See* Pres. Proc. 5928, Dec. 27, 1988. Thus, the seaward boundary between United States territory and the international high seas is now 12 miles offshore -- nine miles beyond most States' three-mile seaward boundaries, and three miles beyond the historic nine mile seaward boundary of Texas and Florida in the Gulf of Mexico. Thus, any ambulation of a State's seaward boundary would be well within the seaward boundary of U.S. territory.

Likewise, within the Exclusive Economic Zone which extends 200 miles from the coastline, the United States possesses full jurisdiction and control, to the exclusion of all foreign powers, over the natural resources therein. *See* Pres. Proc. 5030, (March 10, 1983). Whereas these waters were once regarded as international in character, where actions taken by the United States could affect foreign relations with another country (*See U.S. v. California*, 332 U.S. 19 (1947); *U.S. v. Louisiana*, 339 U.S. 699 (1950); *U.S. v. Texas*, 339 U.S. 707 (1950)), the natural resources within these waters are now purely under domestic, national, control. This being the case, a shifting of the ambulatory boundary between the State and Federal submerged lands could not possibly jeopardize or interfere with national defense or international affairs; the State / Federal boundary is purely within the domestic jurisdiction of the United States vis-a-vis foreign countries.

5. Congress intended that State / Federal disputes concerning offshore submerged lands be negotiated by the Secretary of the Interior, not the Army.

Congress recognized that there might be State / Federal boundary disputes when the Outer Continental Shelf Lands Act was enacted in 1953. *See Statement of Managers on the Part of the House, Outer Continental Shelf Lands Act, reprinted in 1953 U.S. CODE, CONG. & ADMIN. NEWS, 2184.* In recognition of potential disputes over this boundary, Congress did pass "appropriate legislation." *U.S. v. Louisiana*, 394 U.S. 11, 34 (1969). In the event of a dispute "as to whether or not lands are" State owned submerged lands, or federally managed outer continental shelf lands, Congress authorized the Secretary of the Interior, with the concurrence of the Attorney General, to "negotiate and enter into agreements with the State." 43 U.S.C. 1336. These agreements can pertain to "operations under existing mineral leases and payment and impounding of rents, royalties, and other sums ... or ... the issuance or non-issuance of new mineral leases pending the settlement or adjudication of the controversy." *Id.*

This is consistent with the finding of this court that it must not be assumed "that Congress, which has constitutional control over Government property, will execute its powers in such a way as to bring about injustices to States, their subdivisions, or persons acting pursuant to their permission." *U.S. v. California*, 332 U.S. 19, 40 (1947). Indeed, Congress did not allow any such injustice to occur; it specifically provided a remedy for any State / Federal disputes concerning whether submerged lands are State owned or federal outer continental shelf lands, in the Outer Continental Shelf Lands Act.

The authority delegated to the Secretary of the Interior by Congress to negotiate with the States is limited, as noted, to working out an agreement pertaining to existing mineral leases, and the payment of rents and royalties, and the issuance (or non-issuance) of new mineral leases. Congress did not authorize the Secretary of the Interior, or any other federal official or agency, to require a State to waive its rights under the Submerged Lands Act.

Thus, Congress delegated this limited authority in this specific situation to the Secretary of the Interior, not the Army. Any attempt by the Army Corps to require a State to waive its rights under the Submerged Lands Act due to the effect of a coastal project on the location of the State's boundary is an unlawful infringement on this precise, limited, congressional delegation of authority to the Secretary of the Interior. The result of this infringement of authority is the perpetration of an injustice upon the coastal States -- exactly the outcome intended to be avoided by both Congress and this Court.

C. State title and ownership of the submerged lands out to three miles from its coastline, as modified by any natural or artificial causes, is in the "public interest."

*"It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby ... recognized, confirmed established, and vested in .. the respective States ..."* 43



U.S.C. 1311(a). Emphasis added. So Congress "determined and declared" in 1953 when it passed the Submerged Lands Act.

Now comes the Army Corps, however, through the regulations found at 33 C.F.R. Part 320, to reopen the question of whether State title and ownership of the submerged lands out to three miles from its coastline, as modified by any natural or artificial causes, is in the "public interest." In accordance with these regulations, before issuing a permit for the placement of dredge or fill material into the navigable waters of the United States, the Secretary of the Army conducts a "public interest review" of the project. *See* 33 C.F.R. § 320.4(a). One of the factors of this "public interest review" is "whether the coast line or base line might be altered." 33 C.F.R. § 320.4(f). One may well ponder exactly what type of coastal project may be conducted worthy of requiring an Army Corps permit that would not alter the coastline or baseline. In any event, where Congress has so determined and declared something to be in the "public interest," it is not for an executive agency to reopen the question.

## CONCLUSION

All around the country port facilities are being constructed, modernized and improved. Causeways, artificial islands and jetties are being installed to link the Nation's highways and railways with waterborne commerce. Fill is often placed in the navigable waterways to construct permanent causeways for the exploration and production platforms for the recovery of offshore oil and gas. At the



same time, revetments, groins, breakwaters and seawalls are constantly being installed, and beaches are being renourished with additional sand in the never-ending battle against erosion.

But to accomplish any of these projects -- anything from an 8,000 foot causeway to a ten foot beach renourishment project -- a permit must be obtained from the Army Corps to ensure that the project does not obstruct navigation or pollute the waters. Without any statutory authority, however, the Army Corps is now demanding that the State, whether it is a sponsor of the project or not, must waive its rights under the Submerged Lands Act to extend its seaward boundary three miles from the modified coastline, before the Army Corps will issue the permit.

A State, when confronted with such a demand by the Army Corps, must weigh all of the factors before deciding whether to waive its rights. Many State agencies are involved, and thus this review process can be very time consuming. Nonetheless, the Army Corps even makes this demand in emergency situations.

Congress set forth an orderly process for determining the boundary between State and federal submerged lands when it passed the Submerged Lands Act. Congress recognized the ambulatory nature of the coastline. Congress also recognized that disputes will arise between the States and the federal government over whether or not lands are State submerged lands or federal outer continental shelf lands. Congress provided a procedure for resolving these disputes, a procedure that does not authorize the Army Corps to withhold a coastal construction permit until a State waives its rights under the Submerged

Lands Act. By so withholding such a permit, the Army Corps not only acts unlawfully, but introduces an unreasonable delay into the process of obtaining a permit for the myriad of projects that must take place along the country's coastline in order to foster interstate and foreign commerce, protect life and property, and provide for the common welfare.

For these reasons, we respectfully urge this Court to grant to the State of Alaska its prayer for relief.

DATED: October, 1991

Respectfully submitted,

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No. 118, Original

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1991

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF ALASKA,

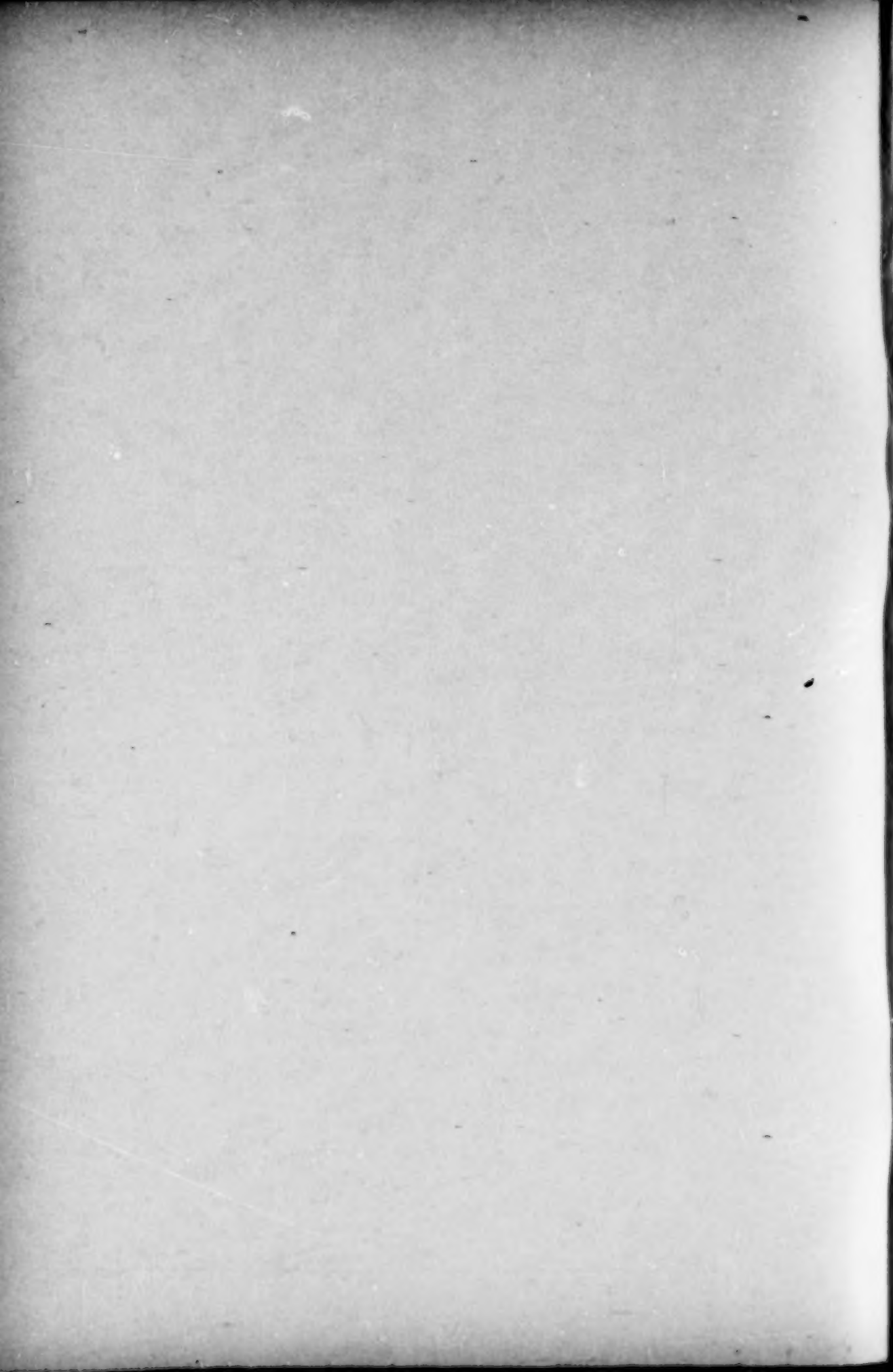
*Defendant.*

**MOTION FOR SUMMARY JUDGMENT  
BRIEF OF STATE OF ALASKA**

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## QUESTION PRESENTED

The question presented in this case is whether the United States Army Corps of Engineers ("Army Corps") can require, as a condition to issuing a permit to a third party to construct a causeway from shore, that the State in which the structure will be located disclaim its right to submerged lands to which it otherwise would be entitled under the Submerged Lands Act of 1953, 43 U.S.C.A. §§ 1301-1315 (1986).

The scope of agency authority is a question of law. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

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39 Fed. Reg. 12115, 12123 (1974).....	33
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 OTHER	
Alexander, The Territorial Sea of the United States: Is it Twelve Miles or Not?, J. of Maritime Law and Commerce 449 (1989) .....	23
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J. Briscoe, Federal-State Offshore Boundary Dis- putes: The State Perspective, Law of the Sea Institute Eighteenth Annual Conference (1984), reprinted in The Developing Order Of The Oceans 380 (R. Krueger and S. Riesenfeld, eds. 1985).....	5
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No. 118, Original

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In The  
**Supreme Court of the United States**  
October Term, 1991

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UNITED STATES OF AMERICA,  
*Plaintiff,*  
v.

STATE OF ALASKA,  
*Defendant.*

---

**MOTION FOR SUMMARY JUDGMENT  
BRIEF OF STATE OF ALASKA**

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**JURISDICTION**

This is an action of original jurisdiction of this Court under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, United States Code, Section 1251(b)(2).

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**MOTION FOR SUMMARY JUDGMENT**

Defendant State of Alaska moves this Court for an order of summary judgment that dismisses the claims of Plaintiff United States with prejudice, and enjoins the United States Army Corps of Engineers from imposing upon permits for coastal projects the condition that the

State in which the project will be located relinquish its valid claims to certain submerged lands.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). See *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Since the parties have stipulated to the pertinent facts, and since the Army Corps has clearly exceeded the scope of its authority under applicable statutes, regulations, and decisions of this Court, Alaska is entitled to judgment as a matter of law.

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## STATEMENT OF THE APPLICABLE LAW

### A. Early Court Rulings Establish States' Rights to Submerged Lands

This Court has adopted the English common law rule that the beds and banks of tidal and navigable waters are not privately owned, but are held by the sovereign in trust for the benefit of the public. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). In *Waddell*, the governmental sovereign asserting the common law was one of the thirteen original States. This Court concluded that the sovereign owned the lands as successor to the English crown. The ownership of such lands was simply one of the incidents of sovereignty which each of the thirteen original States assumed upon achieving independence from England.

Three years later, this Court extended the rule of State ownership to those States subsequently admitted to the Union. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). This Court reasoned that new States must join the Union on an equal footing with the original States in terms of sovereignty. One incident of sovereignty under this "equal footing doctrine" is the ownership of submerged lands underlying navigable waters. As between the States and the United States, this Court unequivocally stated: "The shore of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States, respectively." 44 U.S. (3 How.) at 230. Significantly, this Court noted that the State's territorial limits "extended all her sovereign power into the sea," clearly implying that the rule of State ownership extended offshore. *Id.* at 230.

This Court subsequently upheld State regulation of offshore fishing activity, *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *McCready v. Virginia*, 94 U.S. 391 (1877), relying in large part on the equal footing doctrine ownership cases. Indeed, this Court acknowledged that, under international law, the limits of a nation's right to control offshore fishing "have never been placed at less than a marine league from the coast on the open sea." *Manchester v. Massachusetts*, 139 U.S. 240, 256-59, 35 L. Ed. 159, 164 (1891).<sup>1</sup> It went on to state that "[t]he extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation." *Id.* at 261-64, 35 L.Ed. at 166.

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<sup>1</sup> A marine league is three nautical miles. See 2 A.L. Shalowitz, *Shore and Sea Boundaries*, U.S. Dep't of Commerce, Government Printing Office at 580 (1964).

These and other cases applied the equal footing doctrine rule of States' jurisdiction to bays,<sup>2</sup> tidal rivers,<sup>3</sup> harbors,<sup>4</sup> nontidal rivers,<sup>5</sup> lakes,<sup>6</sup> and tidelands.<sup>7</sup> None of these cases specifically addressed State ownership or jurisdiction (other than for fishing) offshore, but it was universally assumed that State ownership and jurisdiction was the rule.<sup>8</sup> That, however, proved not to be the case.

In *United States v. California*, 332 U.S. 19, 38-39 (1947) ("*California I*"), this Court held that the United States, not California, had plenary jurisdiction over submerged lands offshore. *California I* acknowledged that earlier cases had "used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not." *Id.* at 36. However, *California I* held that none of those cases compelled a decision in the State's favor, and that the United States,

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<sup>2</sup> E.g., *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

<sup>3</sup> E.g., *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1844); *McCready v. Virginia*, 94 U.S. 391 (1877).

<sup>4</sup> E.g., *Weber v. Harbor Comm'rs*, 85 U.S. (18 Wall.) 57 (1873).

<sup>5</sup> E.g., *Barney v. Keokuk*, 94 U.S. 324 (1876).

<sup>6</sup> E.g., *United States v. Holt State Bank*, 270 U.S. 49 (1926).

<sup>7</sup> E.g., *Borax, Ltd. v. Los Angeles*, 296 U.S. 101 (1935).

<sup>8</sup> See, e.g., discussion in H.R. Rep. No. 1778, 80th Cong., 2d Sess. 13-16 (1948).

not California, was the owner of the original title to the three mile marginal belt along the coast. *Id.* at 38.

### B. Current Law Protects States' Rights to Submerged Lands

*California I* prompted a firestorm of protest from the States.<sup>9</sup> Congress acted quickly to reverse it by passing legislation transferring the federal government's interest to the States. The Submerged Lands Act of 1953<sup>10</sup> restored to the coastal States the rights to their offshore submerged lands.<sup>11</sup> Determining the seaward boundary of State-owned submerged lands has been the subject of a considerable amount of this Court's original jurisdiction litigation.<sup>12</sup> For example, this Court held that the Submerged Lands Act grants to Texas and Florida (along her Gulf of Mexico coast) extended three marine leagues (nine nautical miles). *United States v. Louisiana*, 363 U.S. 1, 84 (1960); *United States v. Florida*, 363 U.S. 121 (1960). In

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<sup>9</sup> One commentator suggested that *California I* was more a product of timing – the United States had just emerged victorious from World War II, and concern for national security was high – than logic. J. Briscoe, *Federal-State Offshore Boundary Disputes: the State Perspective*, Law of the Sea Institute Eighteenth Annual Conference (1984), reprinted in *The Developing Order of the Oceans* 380 (R. Krueger and S. Riesenfeld, eds. 1985).

<sup>10</sup> 43 U.S.C.A. § 1301, et seq. (1986).

<sup>11</sup> See *United States v. Louisiana*, 363 U.S. 1, 20-24 (1960).

<sup>12</sup> Cohen, *Wading Through the Procedural Marshes of Original Jurisdiction Guided by the Tidelands Cases: A Trial Before the United States Supreme Court*, 11 Am. J. of Trial Advoc. 65 (1987).

*United States v. California*, 381 U.S. 139 (1965) ("*California II*"), this Court held that Monterey Bay constituted inland waters of the State of California and that the sovereignty of the State under the Act extends from both natural and artificial additions to the shore. *Id.* at 169-70, 176-77. Even an unpermitted artificial extension to Louisiana's coastline was found to extend that State's Submerged Lands Act grant in *United States v. Louisiana*, 394 U.S. 11, 41 n.48 (1969) ("*Louisiana Boundary Case*"). Certain low tide elevations were found to be part of Louisiana's coastline, and Ascension Bay was found to constitute inland waters of the State. *Id.* at 47, 53.

In *United States v. California*, 436 U.S. 32 (1978), this Court held that a 1947 presidential withdrawal and reservation of submerged lands for a national monument did not defeat the grant of those lands to the State under the Submerged Lands Act. In *United States v. Louisiana*, 470 U.S. 93 (1985) ("*Alabama and Mississippi Boundary Case*"), this Court held that Mississippi Sound constituted inland waters of Alabama and Mississippi. Finally, in *United States v. Maine*, 469 U.S. 504 (1985) ("*Rhode Island and New York Boundary Case*"), this Court held that Long Island Sound and Block Island Sound constituted inland waters.

**C. Under the Submerged Lands Act, this Court has Established That There Be One Coastline Measurement for Foreign and Domestic Purposes**

The Submerged Lands Act grants to the coastal States "title to and ownership of" the submerged lands within



their boundaries, 43 U.S.C.A. § 1311(a) & (b) (1986). Generally, these boundaries extend three geographical miles from the coastline. 43 U.S.C.A. §§ 1301(b) & 1312 (1986 & Supp. 1991). See *United States v. Louisiana*, 363 U.S. at 20-25.<sup>13</sup> The "coast line" is defined as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the seaward limit of inland waters." 43 U.S.C.A. § 1301(c) (1986).

That same Congress enacted the Outer Continental Shelf Lands Act, under which the United States asserts "civil and political jurisdiction" to the outer continental shelf. 43 U.S.C.A. § 1331, et seq. (1986). The outer continental shelf consists of "all submerged lands lying seaward and outside of the area of lands" granted to the States under the Submerged Lands Act. 43 U.S.C.A. § 1331(a) (1986). Administration of the outer continental shelf lands is by the Department of the Interior. 43 U.S.C.A. § 1334 (1986).

The Acts leave some very critical terms undefined. See 43 U.S.C.A. §§ 1301, 1331 (1986 & Supp. 1991). Chief among these is the term "coastline"<sup>14</sup> from which the

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<sup>13</sup> The grants to Texas and Florida (along her Gulf of Mexico coast) extend to nine geographical miles. *United States v. Louisiana*, 363 U.S. at 64; *United States v. Florida*, 363 U.S. 121 (1960).

<sup>14</sup> Although the Submerged Lands Act uses the two words "coast line," this Court has consistently used the single word "coastline." See, e.g., *United States v. California*, 381 U.S. 139 passim (1965). We employ the Court's usage in this brief.

Submerged Lands Act grant is measured. In *California II*, 381 U.S. at 165, this Court adopted the definitions of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1607, T.I.A.S. No. 5639, for Submerged Lands Act purposes.<sup>15</sup>

Under this Court's holdings, artificial structures located offshore will generally extend a State's coastline for Submerged Lands Act purposes if they would have that effect under the Convention. See, e.g., *United States v. California*, 432 U.S. 40, 41-42 (1977); *United States v. Louisiana*, 389 U.S. 155, 158 (1967) ("artificial jetties are a part of the coastline for measurement purposes"); *California II*,

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<sup>15</sup> The Convention governs the delimitation of certain maritime jurisdictional zones for purposes of international relations. This Court described the three zones of greatest significance for present purposes as follows:

Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial, sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.

*Louisiana Boundary Case*, 394 U.S. at 22-23 (footnotes omitted).

381 U.S. at 176-77 (artificial changes to coastline change extent of Submerged Lands Act grant). *Cf. United States v. California*, 447 U.S. 1, 6 (1980) (open-piling piers do not extend the coastline because they lack a low water line).

**D. The Army Corps' Permits Should Conform to Applicable Law**

The Army Corps' approval for construction of off-shore structures is required by sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. §§ 401, 403 (1986) ("Rivers and Harbors Act"), and section 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (1986 & Supp. 1991). In deciding whether to approve such a project, the Army Corps considers "the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1) (1990). Where a proposed project may alter the coastline for Submerged Lands Act purposes, "coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken." 33 C.F.R. § 320.4(f) (1990). Nothing in these statutes or regulations authorizes the Army Corps to require that States waive their rights under the Submerged Lands Act before issuing such permits.

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### STATEMENT OF THE PERTINENT FACTS

There are no disputed facts in this case, as the parties have filed a Joint Stipulation of Facts ("Stipulation") with this Court. The Stipulation shows that the City of Nome, Alaska, is a remote rural community on the Seward Peninsula, part of Alaska's western coast. Stipulation at 5a. Nome had a 1980 population of 3,200, with more than 11,200 people living in the greater Nome service area. *Id.* Nome, like many communities in Alaska, is not connected to other population centers by road. It is a major trade, service, and transportation center for smaller communities in its area and all of northwest Alaska. Most goods are shipped in by barge during the ice-free period between June and October. *Id.*

On August 25, 1982, Nome filed an application with the Army Corps for a permit to construct a solid fill causeway with road and terminal facility. *Id.* at 2. Nome intended to construct a 3,575 foot causeway with a road, a breakwater, and an offshore terminal facility. *Id.*

Pursuant to the "coordination" requirement of 33 C.F.R. § 320.4(f) (1990), the Army Corps involved the Solicitor of the Department of the Interior and the United States Attorney General as part of its public interest review process under 33 C.F.R. § 320.4(a) (1990). At the conclusion of the review process, the Army Corps found only one reason not to grant the permit: the causeway would alter Alaska's coastline, thereby shifting Alaska's submerged lands boundary seaward off the tip of the causeway. Stipulation at 2-3, 17a-19a, 22a-23a, 24a, 33a-37a. Approximately 730 acres of submerged lands would have been included within the new boundary. *Id.* at 6.

The Minerals Management Service, the agency within the Department of the Interior which administers the outer continental shelf, and the Solicitor of the Department of the Interior opposed the permit because it would constitute an "artificial accretion that would move Alaska's coastline or baseline seaward." *Id.* at 2. As a result of the Department of the Interior's concern, the Army Corps refused to issue the permit to the City of Nome. *Id.* at 3. Instead, the Army Corps informed the State of Alaska that, "in accordance with the attached letter from the Office of the Solicitor, a permit will not be issued until . . . a waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary." *Id.*

On May 9, 1984, Alaska filed the required disclaimer with the Army Corps. *Id.* at 3-4. However, Alaska believed that the Army Corps had no authority to require the State to waive a statutory entitlement before issuing the permit to Nome. *Id.*<sup>16</sup> Accordingly, Alaska made the disclaimer conditional, and specified that "[t]his disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate proceeding that the Army Corps does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coastline." *Id.* at 29a.

Shortly thereafter, on July 25, 1984, the Army Corps issued the permit to the City of Nome. *Id.* at 5.

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<sup>16</sup> See also 1980 Inf. Op. Alaska Att'y Gen. (Oct. 30; file no. J-66-477-80).



## SUMMARY OF ARGUMENT

### I. STATUTORY AUTHORITY

The Submerged Lands Act entitles coastal States to title to and ownership of the lands and natural resources three miles seaward from the coastline. For Submerged Lands Act purposes, the coastline must be the same as that used by the United States in its international relations. The Army Corps cannot change that result through the disclaimer process. The Army Corps is responsible for issuing permits for construction projects in offshore waters. However, the Army Corps' authority must be exercised under applicable enabling legislation. Under existing statutes, the Army Corps' permits must be based on navigation or environmental considerations. There is no additional statutory authority allowing the Army Corps to require States to disclaim their submerged land rights as a condition for coastal construction. Accordingly, the disclaimer for the Nome Causeway is invalid.

### II. JUDICIAL DECISIONS

This Court has ruled that the coastline of a State is determined in accordance with rules included in the Convention for the Territorial Sea and the Contiguous Zone. Specifically, this Court has approved rules that recognize changes in the coastline caused by natural accretion and construction of permanent artificial structures such as the Nome Causeway. The Army Corps may not ignore the rules of this Court and the guarantees of the Submerged Lands Act. The Army Corps' action here contravenes this Court's decisions and is without underlying statutory basis.



### III. REGULATORY AUTHORITY

The public interest criteria in the Army Corps' regulations do not include any authority for denying permits pending disclaimers from a coastal State. The Army Corps regulations governing coastal construction projects are satisfied if navigational and environmental concerns are adequately addressed. Such was the case in the Nome Causeway permit. Further, the regulations are invalid as they give no notice that they can or will be interpreted to require States to give up submerged lands rights for the sake of a third party's coastal construction project.

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### ARGUMENT

#### I. NOTHING IN FEDERAL STATUTES AUTHORIZES THE ARMY CORPS' PROCEDURE AT ISSUE HERE

##### A. The Submerged Lands Act Entitles Coastal States to an Extension of their Submerged Lands Upon Construction of a Qualifying Structure

As set out above, the Submerged Lands Act gave to the several coastal States the submerged lands within their seaward boundaries. In making the grant, Congress stated that

[i]t is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters,

and (2) the right and power to manage, administer, lease, develop, and use the said lands and resources all in accordance with applicable State law be . . . recognized, confirmed, established, and vested in and assigned to the respective States.

43 U.S.C.A. § 1311(a)(1) (1986). The legislative history of the Act, including that cited in *California II*, gives no suggestion that any coastal State would ever receive more or less than the statutory grant.

Nevertheless, reducing a State's Submerged Lands Act grant by the amount of land to which it would otherwise be entitled upon construction of a structure extending the coastline is precisely what the Army Corps seeks to accomplish here. Nothing in the Submerged Lands Act states that the coastline, from which the State's seaward boundary and Submerged Lands Act grant is measured, is not extended by such structures. In fact, as interpreted by this Court, the Submerged Lands Act *requires* that a State's coastline be extended by such structures.

The Act did leave open a number of questions as to the precise location of the coastline from which the grant is to be measured. In *California II*, 381 U.S. at 165, this Court incorporated the provisions of the international Convention on the Territorial Sea and the Contiguous Zone into the Submerged Lands Act to provide answers to those questions. One consequence of the incorporation of the rules of the Convention into the Submerged Lands Act was to clarify the uncertainty that had existed

regarding the location of the coastline from which seaward boundaries were measured.

Under Article 8 of the Convention, artificial structures with a low water line extend the coastline for the purpose of delimiting a nation's maritime zones. *See generally United States v. California*, 447 U.S. 1, 6-9 (1980). As a consequence of this Court's incorporation of the Convention into the Submerged Lands Act, those structures also necessarily extend the coastline for Submerged Lands Act purposes. Lacking an additional act of Congress to the contrary, there is nothing the Army Corps can do to change the Submerged Lands Act. The Submerged Lands Act, by its terms as interpreted by this Court, compels the result that the Nome Causeway qualifies to extend the coastline.

As this Court explained, "[t]his establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations." *California II*, 381 U.S. at 165. Yet, by demanding that States renounce any Submerged Lands Act effect before issuing the permit required to construct such a structure, the Army Corps is unilaterally seeking to establish two separate coastlines, one for international relations and a different one for the Submerged Lands Act. The Army Corps' efforts to create two separate coastlines must fail since that result would be contrary to the mandates of this Court in the *Louisiana Boundary Case*, 394 U.S. at 34, and *California II*, 381 U.S. at 165.

Congress, of course, could authorize the Army Corps to refuse to issue permits for structures which would

extend the coastline for Submerged Lands Act purposes. States have no inherent entitlement to offshore submerged lands, *California I*, and whatever rights they have to such lands are pursuant to the congressional Submerged Lands Act grant. And, as Alaska has freely admitted in this case,<sup>17</sup> Congress has constitutional authority necessary to prevent States from changing their coastlines and their submerged lands grants "through its power over navigable waters." *California II*, 381 U.S. at 177. Indeed, Congress apparently exercised that Commerce Clause<sup>18</sup> power in the Submerged Lands Act. 43 U.S.C.A. § 1314(a) (1986). In the exercise of that power, Congress clearly could give the Army Corps authority to condition permits on waivers of Submerged Lands Act rights. But Congress has never done that. Instead, as shown below, no congressional authorization allows the Army Corps to demand that a State waive its rights to submerged lands.

**B. The Rivers and Harbors Act Contains No Grant of Authority to the Army Corps to Demand that States Waive Their Entitlements Under the Submerged Lands Act**

The principal source of the Army Corps' permitting authority in navigable waters, including the coastal waters, is the Rivers and Harbors Act, 33 U.S.C.A. §§ 401,

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<sup>17</sup> Memorandum of State of Alaska at 5 (March 1991).

<sup>18</sup> United States Constitution art. I, sec. 8, cl. 3. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

403 (1986). The principal purpose of the Act is to assure that construction projects in navigable waters do not impede navigation.<sup>19</sup> In addition, the Act prohibits the depositing of materials, including pollutants, in navigable waters.<sup>20</sup>

The Administrative Procedure Act, 5 U.S.C.A. §§ 553(b)(2), 706(2)(C) (1977), and interpretive case law, require that agency actions be consistent with underlying statutory authorities. *See, e.g., ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). In *ETSI*, this Court set aside the actions of the Secretary of Interior as beyond statutory authority: the Secretary "is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law". *Id.*

The Army Corps is subject to the rule. *See, e.g., Pacific Northwest Bell Tel. Co. v. United States*, 549 F.2d 1313, 1317 (9th Cir. 1977), *cert. denied*, 434 U.S. 820. Accordingly, the Army Corps' decisions must take into account the legislative intent reflected by the stated purposes and policies of the relevant statutes. Under the Rivers and Harbors Act, those purposes and policies relate to navigation and pollution.

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<sup>19</sup> *See, e.g., Wyandotte Co. v. United States*, 389 U.S. 191, 201 (1967); *Wisconsin v. Illinois*, 278 U.S. 367 (1929); *Dow Chemical Co. v. Dixie Carriers, Inc.*, 330 F. Supp. 1304 (D.C. Tex. 1971), *aff'd*, 463 F.2d 120 (5th Cir. 1972), *cert. denied*, 409 U.S. 1040. Indeed, as early as 1909, the United States Attorney General recognized that the Army Corps' authority under this statute was limited to navigation concerns. 27 Op. Att'y Gen. 285 (1909).

<sup>20</sup> *Illinois v. City of Milwaukee*, 406 U.S. 91, 101 (1972).



**C. No Other Laws Grant Authority to the Army Corps to Deny Coastal Construction Permits Unless a State Waives Its Rights Under the Submerged Lands Act**

A review of the Army Corps' other statutory grants of authority reveals no grounds for denying the permit to Nome and obliging the State of Alaska to issue a disclaimer as a condition to issuing the permit. Most of these statutes involve environmental or historical considerations such as those under the Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act,<sup>21</sup> the Marine Protection, Research and Sanctuaries Act of 1972,<sup>22</sup> the Marine Mammal Protection Act of 1972,<sup>23</sup> the National Environmental Policy Act of 1969,<sup>24</sup> the National Historic Preservation Act of 1966,<sup>25</sup> the Fish

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<sup>21</sup> 33 U.S.C.A. § 1344 (1986 & Supp. 1991) (empowers the Army Corps, in conjunction with the Environmental Protection Agency, to specify those locations within navigable waters that may be dredged or filled).

<sup>22</sup> 33 U.S.C.A. § 1413 (1986) (to prevent ocean dumping that will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities).

<sup>23</sup> 16 U.S.C.A. § 1361, et seq. (1986 & Supp. 1991) (to prevent harassment, hunting, capturing or killing of marine mammals).

<sup>24</sup> 42 U.S.C.A. §§ 4321-4347 (1977 & Supp. 1991) (requiring, "to the fullest extent possible, that all agencies of the Federal Government shall . . . insure that presently unqualified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations").

<sup>25</sup> 16 U.S.C.A. § 470, et seq. (1985 & Supp. 1991) (preservation of historic places).



and Wildlife Coordination Act of 1956,<sup>26</sup> the Federal Power Act of 1920,<sup>27</sup> the Endangered Species Act,<sup>28</sup> the Wild and Scenic Rivers Act,<sup>29</sup> the National Fishery Enhancement Act of 1984,<sup>30</sup> etc. A list is included in 33 C.F.R. § 320.2 (1990), *Authorities to issue permits*.

Many of these statutory authorities were included in the Army Corps' public notice and final permit for the Nome Causeway project. See Stipulation at 14a-15a, 34a-36a. However, none include a grant of statutory authority to the Army Corps to demand that a State waive its Submerged Lands Act rights before the permit will be issued.

Reported cases confirm the necessity of underlying statutory authority. For example, in *Zabel v. Tabb*, 430 F.2d

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<sup>26</sup> 16 U.S.C.A. § 742a, et seq. (1985 & Supp. 1991) (any federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service).

<sup>27</sup> 16 U.S.C.A. § 691a, et seq. (1985 & Supp. 1991) (protects navigation potential of navigable waters subject to F.E.R.C. licenses).

<sup>28</sup> 16 U.S.C.A. § 151, et seq. (1974 & Supp. 1991) (federal agencies must use their authorities to protect endangered and threatened species).

<sup>29</sup> 16 U.S.C.A. § 1278, et seq. (1985 & Supp. 1991) (no federal agency shall assist any water resources project that would have a direct and adverse effect on values for which the river was designated).

<sup>30</sup> 33 U.S.C.A. § 210, et seq. (1986 & Supp. 1991) (Department of the Army permits for artificial reefs to promote and facilitate responsible and effective efforts to establish artificial reefs).

199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the court held that it was permissible for the Army Corps to deny a permit because the project would harm the environment, but only because the Fish and Wildlife Coordination Act, 16 U.S.C.A. § 661, et seq. (1985), and the National Environmental Policy Act, 42 U.S.C.A. § 4331, et seq. (1977), made clear that the Army Corps could deny a permit on that ground.<sup>31</sup>

In *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97, 106 (2d Cir. 1970), the Army Corps was enjoined from issuing a permit where issuance would have effectively foreclosed the Secretary of Transportation's statutory duty to consider the effect of the project on environmental values. *See also Potomac River Ass'n, Inc. v. Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344, 358 (D. Md. 1975) ("since the original purpose of the [Rivers and Harbors] Act was to protect navigation, the Act should not be tortured into interpretations which satisfy legislative needs which have not yet been fulfilled").

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<sup>31</sup> In *Zabel*, the Court of Appeals reversed the district court's determination, 296 F. Supp. 764 (M.D. Fla. 1969), that the consultation requirements of the Fish and Wildlife Coordination Act and the National Environmental Policy Act did not give the Army Corps authority to deny a permit application on a basis other than interference with navigation. The District Court had concluded that "[t]he way is open to obtain a remedy for future situations like this one if one is needed and can be legally granted by Congress." The Court of Appeals held that such a remedy already had been granted by Congress in the Acts cited.

Significantly, courts have held that the scope of the Army Corps' authority must "be in accordance with the law." See *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 566 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied sub nom. City of New Haven v. Marsh*, 488 U.S. 848 (1988) (under section 10 of the Rivers and Harbors Act and section 404 of the Clean water Act, the Army Corps' authority to consider economic impacts in its public interest review is limited to those economic effects caused by the project's impacts on the physical environment); see also *Missouri Coalition for the Environment v. Corps of Engineers*, 678 F. Supp. 790, 802 (E.D. Mo. 1988), *aff'd*, 866 F.2d 1025, 1033-34 (8th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 76 (1989) (the Army Corps is not empowered to regulate economic competition between communities or to make political decisions as to which community's economic interests ought to be preferred, citing *Mall Properties, Inc.*).

This Court has also clearly warned that agencies regulating coastal development must act within their authority. Thus, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), the California Coastal Commission exceeded its police power authority when it tried to extract a public access easement from a shoreline landowner who had applied for a home construction permit. This Court found the obtaining of the easement, however well intentioned, did not conform to the Commission's underlying land-use regulation powers. *Id.* at 838-39. In fact, this Court characterized this *ultra vires* agency action as "out-and-out extortion." *Id.* at 837. Similarly, here, the

Army Corps acts outside its power to protect navigation when it extorts a waiver to a States' Submerged Lands Act rights before it will issue a permit to the applicant.

**II. THIS COURT'S DECISIONS PROVIDE NO AUTHORITY FOR THE ARMY CORPS TO REQUIRE STATES TO WAIVE RIGHTS TO SUBMERGED LANDS**

**A. The Army Corps' Practice of Requiring Waivers of States' Rights Under the Submerged Lands Act Before Issuing Permits Contradicts the Rationale Underlying This Court's Incorporation of the Territorial Sea Convention into the Submerged Lands Act**

The Army Corps' practice at issue here directly contradicts and frustrates this Court's purpose in incorporating the provisions of the Convention on the Territorial Sea and the Contiguous Zone into the Submerged Lands Act. In *California II*, this Court explained its rationale as follows:

It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act. *This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention).*

381 U.S. at 165 (emphasis added).

The goal of a single coastline is frustrated if the determination of seaward boundaries depends on whether or not a coastal construction project has been subjected to a disclaimer.<sup>32</sup> For example, there is no ready reference for mariners to determine if a coastal construction project has been subjected to a disclaimer and, if so, what the disclaimer covers in its terms. This not only confuses the jurisdiction for seabed resources and salvage but every fisherman who harvests crab, salmon, herring, or other species in the area may well wonder if those resources are under State or Federal jurisdiction.

Whether a resource is under State or Federal jurisdiction has civil<sup>33</sup> as well as criminal implications.<sup>34</sup> In fact, there are more than thirty United States laws that refer to Federal jurisdiction that begins at the seaward boundary of the three mile distance from the coastline.<sup>35</sup>

#### **B. The Army Corps Mistakenly Relies on this Court's Decisions For Its Disclaimer Requirement**

The United States claims that this Court "has stated that the United States may 'protect itself' from such

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<sup>32</sup> Examples of coastal construction projects that have been and have not been subjected to recent disclaimers will be lodged by the parties with this Court. Stipulation at 7.

<sup>33</sup> *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130 (1982).

<sup>34</sup> *Corbin v. State*, 672 P.2d 156 (Alaska 1983), appeal dismissed, *Corbin v. Alaska*, 467 U.S. 1223 (1984).

<sup>35</sup> Alexander, *The Territorial Sea of the United States: Is it Twelve Miles or Not?*, J. of Maritime Law and Commerce 449, 479-81 (1989).



artificial changes in the coastline and consequent encroachment upon its submerged lands 'through its power over navigable waters.' " Stipulation at 17a-18a; Plaintiff's Brief in Support of Motion at 3, citing *Louisiana Boundary Case*, 394 U.S. at 41-48; *California II*, 381 U.S. at 177.

In those cases, however, this Court simply acknowledged that the United States has the constitutional power to prevent the several coastal States from unilaterally increasing their Submerged Lands Act grants by extending the coastline seaward through artificial means. Thus, in the *Louisiana Boundary Case*, 394 U.S. at 41 n.48, this Court had no trouble concluding that the United States had the power to deal with an unpermitted and unauthorized artificial extension of the coastline: "If the United States is concerned about such extensions of the shore, it has the means to prevent or remove them."

In *California II*, this Court stated:

When this case was before the Special Master, the United States contended that it owned all mineral rights to lands outside inland waters which were submerged at the date California entered the Union, even though since enclosed or reclaimed by means of artificial structures. The Special Master ruled that lands so enclosed or filled belonged to California because such artificial changes were clearly recognized by international law to change the coastline. Furthermore, the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes



could thus be the subject of agreement between the parties.

....

The considerations which led us to reject the possibility of wholesale changes in the location of the line of inland waters caused by future changes in international law . . . do not apply with force to the relatively slight and sporadic changes which can be brought about artificially. Arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters.

381 U.S. at 176-77.

From this, the Solicitor of the Department of the Interior and the Department's Minerals Management Service conclude that this Court has "encouraged" agreements to "prevent modification of the outer Continental Shelf rights of the United States," Stipulation at 22a-23a, and to "preserve the status quo" in all cases of artificial coastline accretion associated with coastal construction projects. *Id.* at 18a. Although *California II* acknowledged the Special Master's comment on such agreements between the parties, that mere reference does not represent the necessary congressional authority or any judicial "encouragement" for the Army Corps to, in effect, "extort" an agreement that contravenes the Submerged Lands Act.

In addition, the Master's report was completed as a result of the decision in *California I*, prior to the enactment of the Submerged Lands Act in 1953. *California II*, 381 U.S. at 143. Therefore, that report could not have contemplated any renunciation of the States' submerged lands rights.

**C. This Court has Strongly Condemned the Use of Governmental Permitting Authority to Obtain a Proprietary Advantage**

This Court has expressed strong disapproval of governmental action which seeks to coerce the granting of a proprietary benefit. For example, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the California Coastal Commission conditioned the granting of a permit to replace a small bungalow with a larger house on granting the public an easement to pass across the Nollan's beach. This Court first assumed, without deciding, that there might be legitimate police power purposes for the Commission to simply deny the permit altogether, without violating constitutional limitations. *Id.* at 835-36. This Court then noted that a condition short of denial would be permissible if it served the same police power purpose as an outright denial would have served. *Id.* at 836. But since the condition – the granting of an easement – did not serve the same purposes as an outright denial would have, the condition was not valid. This Court condemned this practice in the strongest language: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use

but 'an out-and-out plan of extortion.' " *Id.* at 837 (emphasis added).

The overreaching by the Army Corps in the case of the Nome Causeway is even more egregious than that condemned so strongly in *Nollan*. Here, the Army Corps refused to issue a permit to the otherwise deserving City of Nome. In so doing, the Army Corps effectively held the Nome Causeway hostage to advance the proprietary interests of the Department of the Interior over those of the State. Nothing in the cases cited by the United States in support of the Army Corps' action even remotely sanctions such a practice.

### III. THE ARMY CORPS' REGULATIONS PROVIDE NO AUTHORITY FOR THE ARMY CORPS' PROCEDURE AT ISSUE

#### A. Existing Army Corps' Regulations Do Not Authorize the Army Corps' Disclaimer Requirement

Just as regulations governing procedures on the issuance of permits for coastal construction projects must be consistent with statutory authorities, the Army Corps' actions in establishing permit conditions must be consistent with applicable regulations. See *Service v. Dulles*, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government administrator are binding upon him as well as the citizen"). Assuming, *arguendo*, that the regulations of the Army Corps are valid, those regulations provide no authority allowing the Army Corps to require a State to disclaim its rights in submerged lands when shifts in the

coastline occur as a result of a coastal construction project.

**B. The Army Corps' Decision Is Not Supported by the Plain Language of 33 C.F.R. § 320.4(f)**

**1. 33 C.F.R. § 320.4(f) addresses activities on submerged lands, not property rights to submerged lands**

A regulation generally must be applied in accordance with its plain meaning. See *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). Thus, though an agency's interpretation is usually controlling, it is set aside when it is "plainly inconsistent" with the wording of the regulation. *United States v. Larionoff*, 431 U.S. 864, 872 (1977). 33 C.F.R. § 320.4(f) (1990) contains no language that suggests the Army Corps may force a coastal State to abdicate its rights to submerged lands as a condition for a shoreline project, especially where the State is not the entity proposing the project. Instead, the regulation addresses activities on submerged lands, not the property interests in the submerged lands.

**2. Interagency coordination does not authorize the Army Corps to require this disclaimer**

The United States asserts that the interagency coordination provisions of 33 C.F.R. § 320.4(f) allow the Army Corps to take into account the "effect an addition to a State's coastline will have on the offshore property interests of the United States." Plaintiff's Brief in Support of Motion at 3. It concludes that extension of the coastline of

the State of Alaska would be "to the detriment of the offshore property interests of the United States." *Id.* Therefore, Nome's permit application was denied. Stipulation at 3.

Notwithstanding the Army Corps' contrary interpretation, the plain language of 33 C.F.R. § 320.4(f) (1990) does not encompass consideration of property interests. It simply requires a two-step review that does not even mention property interests. The first step requires the Secretary of the Army to submit "a description of the proposed work and a copy of the plans to the Solicitor [of the Department of the Interior]," requesting "his comments concerning the effects of the proposed work on the outer continental shelf rights of the United States." After the Solicitor's comments are returned to the Secretary of the Army, the Secretary of the Army reviews the application and makes a final decision "after coordination with the Attorney General."

The coordination review is not concerned with property ownership disputes. 33 C.F.R. § 320.4(g)(6) (1990) states that "dispute[s] over property ownership will not be a factor in the Army Corps' public interest decision." This is consistent with the Submerged Lands Act.

**3. "Coordination" does not allow the Department of the Interior and the Attorney General to veto otherwise valid permits**

Under the Army Corps' interpretation of its coordination responsibilities in 33 C.F.R. § 320.4(f), the Solicitor of the Department of the Interior and the United



States Attorney General may dictate denial of all applications for coastal construction projects that have any effect on the baseline. Stipulation at 2-3, 18a. Thus, the Department of the Interior requires disclaimers of the State's interests in "all cases of artificial coast line accretion that come to its attention." *Id.* at 18a. The United States Attorney General concurs, *id.* at 32a, and the Army Corps follows suit. *Id.* at 24a.

Delegation of decision-making authority to other agencies is allowed only to the extent the delegation is based on underlying statutory authority. See *Assiniboine and Sioux Tribes v. Board of Oil and Gas*, 792 F.2d 782, 795 (9th Cir. 1986). The statutes and regulations relating to the permitting authority of the Army Corps do not allow such delegation.

Coordination means to "to work together harmoniously."<sup>36</sup> It does not imply that the Army Corps will automatically render whatever decision is dictated by the coordinating agency, as it did in this case. In a similar situation, involving consultations with the Department of the Interior, an appellate court warned that the Secretary of the Army shall make "the ultimate decision" and should not "abdicate his sole ultimate responsibility and authority." *Zabel v. Tabb*, 430 F.2d 199, 211, 213 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Similarly, the Army Corps has no authority to assign its decision-making responsibility in this case to the Department of the Interior or the Attorney General.

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<sup>36</sup> *American Heritage Dictionary* 321 (2d College Ed. 1982).



**C. The Army Corps' Public Interest Criteria in 33 C.F.R. § 320.4(a) Do Not Warrant Disclaimer of States' Submerged Lands Rights**

The Plaintiff's Brief in Support of Motion at 3 suggests that the Public Interest Review analysis of 33 C.F.R. § 320.4(a) requires that "[a]mong the factors the Secretary and Army Corps of Engineers take into account is the effect an addition to a State's coast line will have on the offshore property interests of the United States." However, the regulation actually makes no reference to property interests of the United States.

33 C.F.R. § 320.4(a)(1) (1990) does include 23 separate criteria to be evaluated in balancing the public interest. The criteria are (1) conservation; (2) economics; (3) aesthetics; (4) general environmental concerns; (5) wetlands; (6) historic properties; (7) fish and wildlife values; (8) flood hazards; (9) floodplain values; (10) land use; (11) navigation; (12) shore erosion and accretion; (13) recreation; (14) water supply and conservation; (15) water quality; (16) energy needs; (17) safety; (18) food and fiber production; (19) mineral needs; (20) considerations of property ownership; (21) the needs and welfare of the people; (22) compliance with Environmental Protection Agency 404(b)(1) guidelines; and (23) other applicable criteria (*see* 33 C.F.R. §§ 320.2, 320.3).

The criteria concerning considerations of property ownership are explained in detail in 33 C.F.R. § 320.4(g) (1990), the same section that, in subsection (6), specifically excludes consideration of "dispute[s] over property ownership." Instead, the section is concerned with

various effects of the project on "property of others," "public health and safety . . . floodplain or wetland values," or which are otherwise "contrary to the public interest." 33 C.F.R. § 320.4(g)(2) (1990). Clearly, these values cannot be extended to cover disputes over property ownership.

When the Army Corps attempted to extend another one of the public interest criteria in 33 C.F.R. § 320.4(a) beyond the physical environment of the project, a District Court warned that the economic and other criteria relating to the public interest evaluation had to be "proximately related to changes in the physical environment." *Mall Properties, Inc. v. Marsh*, 672 F. Supp. at 571. The court held that the economic evaluation should have been limited to those economic effects caused by the project's impacts on the physical environment. Similarly, in *Missouri Coalition for the Environment v. Corps of Engineers*, 678 F. Supp. 790, 802 (E.D. Mo. 1988), *aff'd*, 866 F.2d 1025, 1033-34 (8th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 76 (1989), the court cautioned that the Army Corps "is not empowered to regulate economic competition between communities or to make political decisions as to which community's economic interest ought to be preferred."

**D. Rules Relied Upon by the Army Corps in Reviewing Permits Were Not Adopted in Accordance With the Administrative Procedure Act**

**1. No public notice was given of the criteria relied on here by the Army Corps**

Title 5 U.S.C.A. § 706(2) (1977) provides that a reviewing court shall "hold unlawful and set aside

agency action, findings, and conclusions found to be . . . without observance of procedure required by law. . . . " 5 U.S.C.A. § 706(2)(D) (1977). In accordance with this mandate, the State's disclaimer should be set aside because the Army Corps did not follow procedures required by law.

The first version of 33 C.F.R. § 320.4(f) appeared without public notice in the Federal Register on December 18, 1968 as a revision to 33 C.F.R. § 209. It read:

All applications for permits for structures or work in Coastal waters will be specifically reviewed to consider the impact on the base line from which to measure the width of the three-mile belt of submerged land given to the States by the Submerged Lands Act. Where any change in the base line would result, the application with report thereon will be forwarded to the Chief of Engineers for discussion with the Attorney General before final action is taken.

33 Fed. Reg. 18669, 18671 (1968) (to be codified at 33 C.F.R. § 209.120(d)(4)). This language no longer exists.

In 1974, the Army Corps renumbered this provision, and revised and expanded it to what is substantially its present form. 33 C.F.R. § 209.120(f)(10) (1974). *See* 38 Fed. Reg. 12217, 12221 (1973); 39 Fed. Reg. 12115, 12123 (1974). In 1977, the Army Corps moved this provision to its current location, 33 C.F.R. § 320.4(f). *See* 42 Fed. Reg. 37122, 37137 (1977). The only other apparent modification to the rule came in 1986, when the phrase "three mile belt" was changed to "territorial sea." *See* 51 Fed. Reg. 41220, 41224 (1986).

At no time did any of the above publications of the rule contain an explanation of its purpose. There was never any statement by the Army Corps of a possible federal claim to priority in ownership of submerged lands contrary to the Submerged Lands Act. More important, however, neither the current version of the rule nor its predecessors contain any mention of criteria the Army Corps actually uses when evaluating permits that affect ocean boundaries. Hence, the regulation is void under 5 U.S.C.A. § 706(2) (1977).

**2. The Army Corps has violated section 3 of the Administrative Procedure Act, 5 U.S.C.A. § 552**

Section 3 of the Administrative Procedure Act, 5 U.S.C.A. § 552(a)(1) (1977), requires that agencies publish and explain their operational rules. Unlike section 4 of the Administrative Procedure Act, 5 U.S.C.A. § 553 (1977), which is applicable to proceedings for the promulgation of substantive rules, section 3 applies to a broad range of agency policies, rules, and procedures. This section of the Administrative Procedure Act was adopted to provide, among other things, that administrative policies "be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). See generally S. Rep. No. 752, 79th Cong., 1st Sess. 12-13 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 21-23 (1946). While the primary purpose of this section is to open administrative processes to the scrutiny of the general public, Congress was also concerned about those "forced to litigate with agencies on

the basis of secret laws." See *Renegotiation Bd. v. Bannerkraft Co.*, 415 U.S. 1, 9 (1974).

Here, the Army Corps' failure to promulgate the criteria it employed in evaluating the permit application of the City of Nome is no less egregious than the failure to promulgate eligibility criteria in *Morton v. Ruiz*. The appropriate remedy is to enjoin the Army Corps from imposing conditions on shoreline permits pursuant to these rules or procedures, and set aside the disclaimer at issue here. See *Renegotiation Bd. v. Bannerkraft*, 415 U.S. at 20 (the court may enjoin agency action or provide other equitable remedies for violations of 5 U.S.C.A. § 552).

**3. The Army Corps has failed to observe the procedures of section 4 of the Administrative Procedure Act, 5 U.S.C.A. § 553**

The Administrative Procedure Act requires that rules used as a basis for agency decisions be published in the Federal Register. 5 U.S.C.A. § 553(b) (1977). Interested parties must be given a "reasonable opportunity to participate in the rulemaking process." *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874, 885 (4th Cir. 1983), cert. denied, 465 U.S. 1080 (1984).

While agencies may articulate policies, interpret rules, and develop guidelines in the course of adjudicative proceedings, adjudication may not be used as a substitute for substantive, legislative rulemaking. See generally *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 761 (1969). In the case of the Nome Causeway, the Army Corps, under the guise of its power to rule on the merits of permit applications, is actually employing an unknown



substantive rule to resolve boundary disputes between the States and the federal government. Such a rule is subject to formal rulemaking procedures, and is invalid until those procedures have been followed.

**4. The Army Corps' actions here are arbitrary and capricious, and not based on substantial evidence**

The Administrative Procedure Act proscribes agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(1)(A) (1977). An arbitrary decision is one not based on consideration of the relevant factors. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

The denial of Nome's application for a causeway permit pending a disclaimer of submerged lands from the State of Alaska is an arbitrary and capricious act. There is no rational connection between the denial and the factors the Army Corps is empowered to consider by Congress. The Army Corps' denial appears to have been automatic and without statutory or regulatory standards. By relying on factors not relevant and not intended by Congress, the Army Corps' decision is arbitrary and capricious and must be invalidated. Cf. *Marsh*, 490 U.S. at 378. See *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").



Moreover, since the Army Corps relied upon factors it did not publish and that were not authorized by Congress, there was no substantial evidence in the record. As a result, the City of Nome could not have prepared itself in any meaningful way to provide information to the Army Corps (and to the Departments of Interior and Justice) to avoid rejection of their permit. Similarly, it would have been impossible for the State of Alaska to have predicted in advance that the Army Corps, or the Solicitor of the Department of the Interior, or the United States Attorney General, would have rejected a third party's permit application unless the State waived its rights to certain submerged lands. Since no evidence was submitted on the factors relied upon by the Army Corps, there was no evidence for the Army Corps to consider. Its decision cannot be said to be based on substantial evidence and is invalid. 5 U.S.C.A. § 706(2)(E) (1977).

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## CONCLUSION

The Army Corps exceeded its authority by withholding a permit for the City of Nome for a coastal construction project until the State of Alaska disclaimed its submerged lands entitlements under the Submerged Lands Act. This Court has affirmed that natural shifts in the coastline and artificial coastal construction projects, such as the Nome Causeway, change the coastal baseline and alter the coastal boundaries for purposes of the Submerged Lands Act. The Army Corps has no authority to contravene the limits of existing statutes or its own applicable regulations in this regard. Nor may the Army Corps

disregard the decisions of this Court and unilaterally dictate a State's submerged lands boundaries.

For the reasons given above, the State of Alaska requests the following relief:

1. That the Court enter a decree declaring that the Army Corps does not have the legal authority to require a State to waive any submerged lands claims it might make following construction of an artificial structure extending the coastline before the Corps will issue a permit for construction of such a structure.

2. That the Court enter a decree declaring that, as a consequence of the Army Corps' lack of authority to require such waivers, the waiver executed by the State of Alaska with respect to the Nome facility, by its terms, is void and of no force and effect.

3. That the Court enter a decree declaring that, as a consequence of the voiding of the waiver, the submerged lands described in paragraph IX of the Complaint appertain to the State of Alaska and are subject to its exclusive jurisdiction and control, and that the United States has no title thereto or interest therein.

4. For such other relief as the Court may deem appropriate.

DATED: October 21, 1991

Respectfully submitted,

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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

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ON BILL OF COMPLAINT

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**BRIEF FOR THE UNITED STATES IN OPPOSITION  
TO THE MOTION OF THE STATE OF ALASKA  
FOR SUMMARY JUDGMENT**

---

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UNITED STATES OF AMERICA, PLAINTIFF

*v.*

STATE OF ALASKA

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*ON BILL OF COMPLAINT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION  
TO THE MOTION OF THE STATE OF ALASKA  
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**ARGUMENT**

The United States and the State of Alaska agree that the controlling legal issue in this case is whether the Secretary of the Army may decline to issue a permit for construction of an artificial addition to the coast line unless the coastal State agrees that the construction will be deemed not to alter the location of the federal-state boundary. They disagree, however, as to the proper legal analysis. In our brief supporting the United States' motion for summary judgment, we urged that (1) the Secretary may consider the public interest in determining whether to issue a permit under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403; (2) he may evaluate, as part of his

public interest review, a coastal structure's effect on the location of the federal-state boundary; and (3) he properly declined to issue a permit in this case unless the State agreed to execute a disclaimer preserving that boundary. The State of Alaska argues, by contrast, that the relevant statutes, judicial decisions, and regulations provide no authority for the Secretary's actions. As we explain below, Alaska is mistaken.

**A. Alaska Incorrectly Asserts That Section 10 Of The Rivers And Harbors Appropriation Act Of 1899 Does Not Allow The Secretary Of The Army To Deny A Permit Based On The Effect Of A Proposed Structure On The Location Of The Federal-State Boundary**

1. Alaska asserts that the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, entitles coastal States to an addition to their submerged lands grants upon construction of a qualifying structure. Alaska Br. 13-16. Alaska "freely admit[s]," however, that "Congress has constitutional authority necessary to prevent States from changing their coastlines" and that "Congress clearly could give the Army Corps authority to condition permits on waivers of Submerged Lands Act rights." *Id.* at 16. As Alaska recognizes, the crux of the issue here is whether Congress has done so. We submit that Congress has given the Secretary of the Army that authority through Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403.

As we explained in our brief supporting the United States' motion for summary judgment (at 15-28), Congress has drafted Section 10 to impose a complete prohibition on the creation of "any obstruction" in navigable waters. 33 U.S.C. 403. It has then given

the Secretary of the Army, who is charged with executing that law, the power to allow exceptions on a case-by-case basis, where a structure or work is recommended by the Army Corps of Engineers. 33 U.S.C. 403. But Section 10 neither specifies the factors that the Secretary must consider in deciding whether to authorize construction in coastal or other waters nor limits the range of factors that he may deem relevant. Instead, it gives the Secretary discretion to identify the relevant considerations. Compare *Jay v. Boyd*, 351 U.S. 345, 353-354 (1956).

Alaska argues that Section 10 restricts the Secretary's permitting decision to considerations of "navigation and pollution." Alaska Br. 17. Section 10, however, contains no such restriction. Section 10 refers to "navigation" only insofar as it prohibits the "creation of any obstruction \* \* \* to the navigable capacity" of United States waters. That provision confirms that a structure like the Nome causeway—which extends 2700 feet seaward into Norton Sound and would therefore constitute an obstruction to "navigable capacity"—is prohibited unless the Secretary authorizes it. But the quoted provision does not limit the factors that the Secretary may consider in determining whether to authorize such a structure. See U.S. Br. 18, citing *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 662 (1973). And Section 10 does not refer to "pollution" at all. See 33 U.S.C. 403.<sup>1</sup>

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<sup>1</sup> Alaska notes that Attorney General Wickersham issued an opinion in 1909 stating that Section 10 did not authorize the Secretary to consider the injury that a structure might cause to a "bathing beach." See 27 Op. Att'y Gen. 284, 288 (1909). The Attorney General reasoned that Congress has no power over navigable waters within a State "except to

2. Alaska's acknowledgement that the Secretary may take "pollution" into account, Br. 17, and the amici's acknowledgement that the Secretary may also consider "human health and welfare," the "marine environment," and "economic potential," Coastal States Amici Br. 17, are entirely consistent with—and actually support—*our* position. Section 10 makes no mention of those factors. Alaska and its amici derive them, instead, from *other* federal statutes. See Alaska Br. 18-19; Coastal States Br. 14-17. Thus, Alaska and the coastal States concede that the Secretary may look to the policies that Congress has set out in other laws in channeling the permitting discretion that Section 10 confers on him in unfettered terms. But their survey of those other federal laws is incomplete.

As we explained in our brief supporting the United States' motion for summary judgment (at 21-24), the Secretary adopted a formal and comprehensive process for "public interest review" specifically to keep pace with the evolution of federal law and to conform the agency's exercise of discretion to new legal requirements and policy developments. The Secretary's process considers the full spectrum of relevant statutes and identifies a broad range of congressional policies in addition to those

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preserve or improve the navigability of the stream" and that the Secretary's power "can be no broader than the source from which it is derived." *Id.* at 286, 287. As Alaska recognizes (Br. 16), the premise of the Attorney General's opinion has proven incorrect. See, e.g., *United States v. Appalachian Power Co.*, 311 U.S. 377, 424-427 (1940). Attorney General Wickersham's opinion, which is also inconsistent with this Court's decision in *United States v. Pennsylvania Industrial Chemical Corp.*, *supra*, no longer represents the views of the United States.

set out by Alaska and the coastal States. See 33 C.F.R. 320.2, 320.4. Of particular relevance here, the Secretary takes into account Congress's declaration in the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, that the United States has "jurisdiction, control and power of disposition" over the outer Continental Shelf, which is a "vital national resource reserve" of enormous commercial value. 43 U.S.C. 1332(1) and (3). The Secretary's "public interest review" process explicitly considers that policy by evaluating, as part of the Section 10 permitting process, "the effects of the proposed work on the outer continental rights of the United States." 33 C.F.R. 320.4(f). See U.S. Br. 24-26.

The Secretary's approach is manifestly reasonable and conforms to the requirements of rational decision-making set forth in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Alaska and the coastal States agree that the Secretary may consider statutory environmental policies in the Section 10 permitting process. Alaska Br. 19-21; Coastal States Amici Br. 15. See *United States v. Cumberland Farms*, 826 F.2d 1151, 1158 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988); see also cases cited at U.S. Br. 21. Yet they offer no reason why the Secretary should at the same time ignore statutory policies respecting federal control of the outer Continental Shelf. The Secretary's approach gives effect to the full range of relevant federal law, rather than singling out a few selected statutes.

#### **B. Alaska Incorrectly Interprets This Court's Decisions Respecting The Secretary's Authority**

1. Alaska contends that this Court's decisions "provide no authority" for the Secretary's action in this case. Br. 22. As an initial matter, Alaska over-



looks this Court's decisions in *United States v. Pennsylvania Industrial Chemical Corp.*, *supra*, and *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933). As we have explained, *Pennsylvania Industrial Chemical Corp.* acknowledges the Secretary's broad authority under the Rivers and Harbors Appropriation Act of 1899 to consider factors other than navigation in determining whether to issue a permit. U.S. Br. 18. See also *United States v. Republic Steel Corp.*, 362 U.S. 482, 486-487, 491 (1960) (discussed at U.S. Br. 7-8, 19). And *Greathouse* strongly indicates that the Secretary has discretion to deny a Section 10 permit where its issuance could impair federal property interests. U.S. Br. 19-21.

2. Alaska also is mistaken in asserting that the Secretary's "practice at issue here directly contradicts and frustrates this Court's purpose in incorporating the provisions of the Convention on the Territorial Sea and the Contiguous Zone [ratified by the United States Apr. 12, 1961, 15 U.S.T. 1607] into the Submerged Lands Act." Br. 22. The State relies on the following passage from *United States v. California*, 381 U.S. 139 (1965) (*California II*):

It is our opinion that we best fulfill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act. This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations



(barring an unexpected change in the rules established by the Convention).

381 U.S. at 165 (footnote omitted). Alaska argues that "[t]he goal of a single coastline is frustrated" by the Secretary's insistence upon a disclaimer preserving the federal-state boundary. Br. 23. See also *Coastal States* Br. 7, 21.

Alaska's argument is fundamentally flawed. First, *California II* did not articulate the supposed "goal of a single coastline." Alaska Br. 23. As the quoted passage indicates, the Court adopted the Convention's definitions because they provided the "best and most workable definitions available." 381 U.S. at 165. The Court recognized that using the same definitions for purposes of the Convention and the Submerged Lands Act "establishes a single coastline." *Ibid.* But that was not its overriding "goal." The Court's objective was to give the Submerged Lands Act grant "definiteness and stability"—not to create perfect symmetry between the Convention and the Act. See *id.* at 165-167. Indeed, the Court recognized that the international coast line and the Submerged Lands Act coast line might diverge in the future, and it expressly rejected California's assertion that if the definitions of the Convention were amended, "the extent of the Submerged Lands Act grant would automatically shift." *Id.* at 166.<sup>2</sup>

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<sup>2</sup> The Court's subsequent interpretation of the extraordinary grant of submerged lands to Texas—which is based on the boundaries "as they existed at the time such State became a member of the Union," 43 U.S.C. 1301 (b)—indicates that the Court was not pursuing the "goal of a single coastline." Although the Court had treated harborworks as part of the coast line when measuring California's standard 3-mile grant under the Submerged Lands Act, it refused to include them

Second, there is nothing unusual about divergences between international and federal-state boundaries. This Court recognized in *California II* that a "change in the rules established by the Convention" might render the international and federal-state boundaries non-coincident. 381 U.S. at 165, 166. Moreover, Congress has manifested its willingness to accept variations between the international and federal-state boundaries by providing in the Submerged Lands Act itself that any boundary between the United States and a State that has been fixed by a decree of this Court "shall not be ambulatory," even though the international boundary may move as a result of erosion or accretion. 43 U.S.C. 1301(b). Quite apart from that provision, the President recently proclaimed a 12-mile territorial sea for purposes of international law. See U.S. Br. 9 n.1; *Argentine Republic v. Amerasia Hess Shipping Corp.*, 488 U.S. 428, 441 n.8 (1989). Thus, even where the international seaward boundary and the federal-state boundary formerly coincided, the international boundary now extends 9 miles beyond the 3-mile federal-state limit.

Finally, the coastal States themselves have created, allowed, or endorsed variations between the international boundary and the federal-state boundaries by agreeing to compromise boundary disputes with the United States based on lines that plainly diverge

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as part of Texas's coast line when measuring that State's "historic" 3-league grant under the Act. *United States v. Louisiana*, 389 U.S. 155, 161 (1967). As a result, in the instances of Texas and Florida (see *id.* at 160 n.2), the coast line for purposes of international law differs from the coast line for purposes of the Submerged Lands Act.

from those that would be established under international law. See *Mississippi v. United States*, 111 S. Ct. 380 (1990); see also *California II*, 381 U.S. at 176-177 (endorsing the Special Master's observation that the United States and a State could enter into an agreement concerning the location of the coast line and the federal-state boundary). Hence, even if there once were some notion of pursuing the "goal of a single coastline," Alaska Br. 23, that goal is now beyond reach.

At bottom, Alaska's pursuit of a "single coastline" misdirects the inquiry. The crucial question here is whether the Secretary may deny a Section 10 permit based on the effect a proposed structure would have on the location of the federal-state boundary. A decision to deny a permit on that basis plainly does not create a "dual" coast line. The issue arises only because the Secretary offers the State the *option* of securing the permit for the State (or for another applicant within its borders) by agreeing to disclaim any right to additional submerged lands resulting from the proposed structure. It is Alaska's exercise of that option that creates the situation that Alaska now finds objectionable. Alaska can avoid the situation by simply declining to exercise its option.

3. Alaska attempts to discount (Br. 23-25) the Court's statements in *California II* that support the Secretary's interpretation of his Section 10 powers. As we explained in our brief supporting the United States' motion for summary judgment (at 26-28), the Court endorsed the Special Master's conclusion "that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes could

thus be the subject of agreement between the parties." 381 U.S. at 176; see *id.* at 177. Alaska argues that the Court's reference to the United States' "power" alluded to Congress's constitutional power under the Commerce Clause, rather than the Secretary's power under Section 10. Alaska Br. 24. That contention, however, cannot be squared with the context of the Court's statements.

The Court's observation that the United States had power to resolve future disputes by "agreement" can refer only to the Secretary's powers. Executive Branch officials—not Congress—negotiate and execute "agreements." The Court's understanding is particularly clear when its observation is read in the context of the Special Master's Report. The Special Master stated:

I think it may be assumed that in the past the question of the ownership of the lands, minerals, and other things underlying these artificial accretions has not been taken into consideration by the United States *in passing judgment upon whether the accretions will be permitted*; but it seems clear that in the future *that aspect of the matter can be, and probably will be, taken into account*. I do not share the view of counsel for the United States (U.S. 102) that this would be an undesirable situation. On the contrary, I think it would give opportunity for *appropriate negotiations and agreement between the State and the United States at the time the artificial change is approved*.

*California II*, Report of the Special Master (No. 6 Orig., O.T. 1952), at 46. That discussion makes sense only in relation to the actions of the Secretary in deciding whether to issue a Section 10 permit. Thus, there is no genuine room for doubt that the Court's and the Special Master's observations concerning the

United States' powers referred to the Secretary's already existing powers under Section 10. As we have explained, the Secretary's regulations implement the Court's expectations in *California II*. See U.S. Br. 27-28.<sup>3</sup>

4. Alaska and the coastal States also contend that the Secretary's refusal to issue a Section 10 permit unless Alaska agreed that the construction would be deemed not to alter the location of the federal-state boundary is inconsistent with this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). See Alaska Br. 21, 26-27; Coastal States Amici Br. 19. That argument misconceives the Court's ruling in *Nollan*.

In *Nollan*, a state regulatory agency refused to issue a land owner a permit to build a small bungalow on his beachfront lot unless the owner deeded an

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<sup>3</sup> This Court's decision in *United States v. Louisiana*, 394 U.S. 1 (1969), bolsters our interpretation of *California II*. In *Louisiana*, the Court reaffirmed its *California II* reasoning, stating:

The United States contends that the spoil bank should be ignored because its construction was unauthorized \* \* \*. Even assuming that the creation of the bank was not authorized \* \* \*, it would not follow that it does not constitute part of the coast. If the United States is concerned about such extensions of the shore, it has the means to prevent or remove them. See *United States v. California*, 381 U.S. 139, 177.

394 U.S. at 41 n.48. The Court's observation that the United States could "prevent or remove" unauthorized structures seems directed to the exercise of existing powers, since Section 10 of the 1899 Act already authorized the Secretary to prevent erection of structures and Section 12 of the 1899 Act, 33 U.S.C. 406, empowered the Attorney General to bring an injunctive action to compel the removal of unauthorized structures.



easement allowing the public to cross his property to use the beach. The Court agreed with the agency that

a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.

483 U.S. at 836. The Court explained:

If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

*Id.* at 836-837. The Court concluded, however, that the agency's action was improper because the agency's legitimate reasons for denying a building permit were completely unrelated to the requirement that the land owner provide a public easement. *Id.* at 837. See *id.* at 838-842.

Here, by contrast, the opposite is true. The Army Corps of Engineers (acting pursuant to the Secretary's delegation of authority, see 33 C.F.R. 322.5) refused to issue a Section 10 permit after concluding, in consultation with the Department of the Interior, that construction of the proposed structure would alter the federal-state boundary and transfer valuable mineral-bearing lands from federal to state ownership. See U.S. Br. 28-29. The Corps offered to issue a permit if the State would agree to execute a disclaimer that would preserve the federal-state boundary and prevent the transfer of that property. *Id.* at 29-30. Thus, "the permit condition serves the same governmental purpose as the development ban."



*Nollan*, 483 U.S. at 837. It simply provides a less drastic "alternative to that prohibition" that satisfies the government's regulatory objective. *Ibid.*

Alaska's rhetoric that the Secretary is engaged in "extortion," Alaska Br. 21, 27, has no substance. The submerged lands that Alaska claims the Secretary is "extorting" are *federal* lands. As Alaska's disclaimer expressly states, the agreement simply "maintains the status quo of the baseline and the state-federal boundary" and "does not affect property or claims to which Alaska is now entitled." J.S. 30a. What Alaska really seeks is a windfall. Under Alaska's approach, the Secretary would be obligated to approve the construction of a proposed causeway, without regard to the fact that his approval would result in the transfer of 730 acres of valuable federal land (without any formal governmental consideration) from federal to state hands. More generally, there would be nothing to prevent a State from constructing coastal structures specifically to obtain control of valuable outer Continental Shelf lands. It is unreasonable to believe that Congress—which gave the Secretary broad powers to control coastal structures in the national interest, 33 U.S.C. 403, and identified the lands involved here as part of "a vital national resource reserve," 43 U.S.C. 1332(3)—intended that result.

**C. Alaska Errs In Contending That The Army Corps of Engineers Improperly Applied The Secretary's Regulations In This Case**

1. Alaska broadly argues that the Secretary's regulations "provide no authority" for the Corps' actions in this case. Alaska Br. 27-37. Plainly that is not so. The Secretary's regulations expressly pro-

vide that structures like the Nome port facilities require a Section 10 permit. See 33 C.F.R. 322.3. Those regulations also set out in precise terms the considerations that will guide the Corps' decision whether to issue a permit. 33 C.F.R. 320.4. The regulations make clear that the Corps may include in its evaluation the "effects of the proposed work on the outer continental rights of the United States." 33 C.F.R. 320.4(f). Thus, the Secretary's regulations leave no doubt that the Corps may decline to issue a Section 10 permit based on the effect the proposed project would have on the location of the federal-state boundary. Alaska does not seriously dispute this interpretation of the regulation.<sup>4</sup>

Alaska argues that the regulations are defective because they "provide no authority allowing the Army

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<sup>4</sup> Alaska contends that Section 320.4(f) "addresses activities on submerged lands, not the property interests in the submerged lands." Br. 28. See also *id.* at 29. Alaska does not explain, however, the source of that supposed distinction. See 33 C.F.R. 320.4(f) (requiring consideration of the "effects of the proposed work on the outer continental rights of the United States"). Alaska later cites a separate regulatory provision, 33 C.F.R. 320.4(g), for the proposition that the Corps' review process is not concerned with "property ownership disputes." Alaska Br. 29, 31-32. Alaska, however, cites that provision out of context. The regulation states only that disputes as to whether "the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application \* \* \* will not be a factor in the Corps public interest decision." 33 C.F.R. 320.4(g) (6). It does not prevent the Corps from considering the impact a proposed project would have on the conceded property rights of others (including the State itself). In particular, it does not negate the *express* terms of the immediately preceding paragraph (f), which requires consideration of the "effects of the proposed work on the outer continental rights of the United States." 33 C.F.R. 320.4(f).

Corps to require a State to disclaim its rights in submerged lands when shifts in the coastline occur as a result of a coastal construction project.” Alaska Br. 27-28. See also *id.* at 29, 31-32, 34-35, 37. Alaska apparently believes that the regulations must expressly prescribe the particular curative option that Alaska ultimately utilized in this case. Alaska fails to explain, however, why that is so. As we have explained here and in our brief in support of the United States’ motion for summary judgment, if the Corps can legitimately prohibit the construction of the proposed port facility, it may certainly provide the City of Nome and the State of Alaska with a less drastic alternative to that prohibition that satisfies the government’s regulatory objective. See pp. 9, 13, *supra*; U.S. Br. 29-30. The Corps is not required to communicate that alternative through any particular medium.

As this Court recently recognized, federal agencies do not communicate every policy and practice through formal regulations. See *United States v. Gaubert*, 111 S. Ct. 1267, 1274 (1991) (agencies may “establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs”). Indeed, it would be impossible for an agency to articulate every policy or practice in its regulations. Here, as in *Gaubert*, there is “no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation.” *Id.* at 1277. The Corps acted reasonably in communicating the disclaimer option directly to the permit applicant and to the State. See J.S. 24a-25a.<sup>5</sup>

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<sup>5</sup> Hence, Alaska’s contention that “[i]nteragency coordination does not authorize the Army Corps to require this dis-

Alaska fails to explain why the Corps' approach is improper or what specific advantages would result from identifying the option through a formal regulation. Alaska received fully adequate notice of the option. The Corps expressly informed Alaska that the Solicitor of the Department of the Interior had objected to the issuance of the permit; it specified the particular curative measure that could be taken; and it gave the State ample time to consult with the agency and draft the disclaimer. See J.S. 3, 24a-25a, 26a. The Corps' action could not have come as a surprise. The Corps has requested such disclaimers on a case-by-case basis since 1970. See Joint Lodging of the United States and Alaska (providing copies of various disclaimers). Moreover, Alaska was familiar with the option as a result of similar Section 10 permit proceedings in the past, and it submitted an agreement in this case that is similar in form to its previous disclaimers. *Ibid.* In short, Alaska cannot reasonably attack the government's legal authority to offer it the disclaimer option on the ground that the State is now dissatisfied—after exercising the option—with the manner by which the government communicated it.

2. Alaska also makes the surprising contention that the "rules relied upon by the Army Corps in reviewing permit[] [applications] were not adopted in accordance with the Administrative Procedure

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claimer" (Br. 28-29) is beside the point. There also is no merit to Alaska's related contention (Br. 29-30) that the Corps has improperly delegated its authority through inter-agency coordination. The Corps plainly made the permitting decision in this case. See 33 C.F.R. 320.4(f); J.S. 24a-25a. See U.S. Br. 29.



Act." Alaska Br. 32. As an initial matter, the State of Alaska is not aggrieved in any manner by the "rules relied upon by the Army Corps in reviewing" permit applications. The issue before this Court arises from Alaska's execution of a submerged lands disclaimer and its reservation, within that disclaimer, of the right "to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line." J.S. 30a. Alaska's APA challenge to the Secretary's procedures for reviewing permit application has no bearing on that issue.

In any event, there is no merit to Alaska's contentions. Alaska argues that the Secretary failed to give public notice of his regulations and failed to publish them in the Federal Register in accordance with Section 4 of the APA, 5 U.S.C. 553. Alaska Br. 32-34, 35-36. Alaska is mistaken. The regulations were adopted in 1974, in substantially their present form, through notice and comment rulemaking. See 39 Fed. Reg. 12,115 (1974) (final rule); 38 Fed. Reg. 12,217 (1973) (proposed rule). The Secretary's subsequent recodification and technical amendments were also published in the Federal Register after notice and comment. See 51 Fed. Reg. 41,220 (1986); 42 Fed. Reg. 37,122 (1977).

Alaska further argues that the Secretary violated Section 3(a)(1) of the APA, 5 U.S.C. 552(a)(1), by "fail[ing] to promulgate the criteria it employed in evaluating the permit application of the City of Nome." Alaska Br. 35. As we explained, however, the Secretary's regulations specifically identify the criterion that the Corps relied upon in requesting the disclaimer—"the effects of the proposed work on the

outer continental rights of the United States." 33 C.F.R. 320.4(f). And the Corps specifically informed the City of Nome and the State of Alaska that

in accordance with the attached letter from the Office of the Solicitor, dated May 16, 1983 a [Department of the Army] permit will not be issued until an agreement has been reached between the Alaska Department of Natural Resources and the City of Nome, and a waiver or quit claim deed has been issued preserving the coastline and the State-Federal boundary.

J.S. 24a; see J.S. 22a (Solicitor's letter raising objection based on the "outer Continental Shelf rights of the United States"). Thus, the Corps' objection was based on a regulatory criterion, the City of Nome and the State of Alaska were fully informed of that objection, and they received advice regarding an available curative measure. They were not "forced to litigate with agencies on the basis of secret laws." Alaska Br. 34-35.

3. Finally, Alaska asserts that the Secretary's action here should be set aside, under Section 10 of the APA, 5 U.S.C. 706, as "arbitrary and capricious." Alaska Br. 36-37. As we explained here and in our opening brief, however, just the opposite is true. The Secretary has adopted a "public interest review" process to ensure that his execution of the broad discretion conferred by Section 10 of the Rivers and Harbors Appropriation Act is tied to the congressional policies set out in other federal laws. Consistent with that approach, the Secretary's review process gives express consideration to Congress's declaration that the United States has "jurisdiction, control and power of disposition" over the outer Continental Shelf, 43 U.S.C. 1332, by evaluating "the effects of the pro-



posed work on the outer continental rights of the United States." 33 C.F.R. 320.4(f). See U.S. Br. 24-26. The Secretary acted reasonably and in full accordance with that regulation here in refusing to grant a permit unless Alaska entered into an agreement protecting the United States' outer Continental Shelf rights. By contrast, Alaska's approach, which selectively ignores the important congressional policy in the Outer Continental Shelf Lands Act, would not allow for the consideration of all relevant factors, as the APA contemplates. See, *e.g.*, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

### CONCLUSION

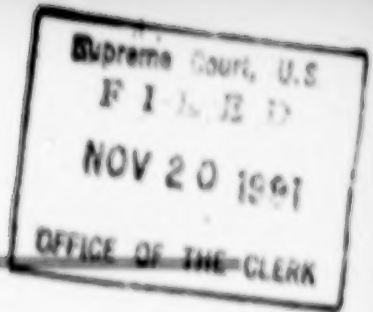
The motion of the State of Alaska for summary judgment should be denied, and the motion of the United States for summary judgment should be granted.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

NOVEMBER 1991

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No. 118, Original



In The  
**Supreme Court of the United States**  
October Term, 1991

UNITED STATES OF AMERICA,  
*Plaintiff,*  
v.

STATE OF ALASKA,  
*Defendant.*

**REPLY BRIEF OF THE STATE OF ALASKA  
IN SUPPORT OF ITS MOTION  
FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The United States has filed a motion to quiet title to certain submerged lands off a coastal causeway constructed by the City of Nome in Norton Sound, Alaska. Prior to construction of the causeway, the lands were beyond three miles of the coastline of Alaska. After construction, the lands in question came within three miles of the coastline. The Submerged Lands Act grants the States title to all submerged lands within three miles of the coastline.

The Army Corps of Engineers ("Army Corps") refused to issue a permit for construction of the Nome Causeway unless Alaska disclaimed its title to the disputed lands. Alaska thereafter submitted a disclaimer subject to judicial review. The United States' arguments have failed to refute the central premise in this case: Congress never authorized the Army Corps to exact unilateral changes in the offshore boundaries established by the Submerged Lands Act.

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## ARGUMENT

### I. THE ARMY CORPS LACKS AUTHORITY TO CONTRAVENE CONGRESS' GRANT OF SUBMERGED LANDS TO THE STATES

#### A. The Army Corps Must Conform Its Practices to the Submerged Lands Act

This case is controlled by a simple proposition of law: what Congress has given the States in the Submerged Lands Act, the Army Corps cannot take away through its

interpretation of the Rivers and Harbors Act. The Submerged Lands Act of 1953 ("SLA") establishes that the boundary of a coastal state extends seaward "to a line three geographical miles distant from its coast line." 43 U.S.C.A. § 1312 (1986 & Supp. 1991). Significantly, the SLA declares that its grant of title to submerged lands is "in the public interest." 43 U.S.C.A. § 1311(a)(1) (1986). The Rivers and Harbors Appropriation Act of 1899 ("RHA") prohibits obstructions "to the navigable capacity of any of the waters of the United States" except as permitted by the Army Corps. 33 U.S.C.A. § 403 (1986). Congress authorized the Army Corps to safeguard the navigability of the nation's waters. It did not exempt the Army Corps from obeying other acts of Congress.

The seaward boundary of state-owned lands is measured from a baseline that is not fixed.<sup>1</sup> Rather, as the United States admits, the coastline is ambulatory, even if the ambulations occur as a result of artificial alterations.

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<sup>1</sup> 2 A. Shalowitz, *Shore and Sea Boundaries* 359 (1964). Shalowitz notes that natural forces cause both gradual and radical changes in the coastline. For example, gradual changes have extended the coastline of the eastern portion of the Mississippi delta by 10 miles in 100 years. As an example of a radical change, in March 1962, a "severe northeaster" moved the coastline from several hundred feet to up to 0.4 miles in several places along the Eastern Seaboard. *Id.* at 359-60. The Alaska earthquake of 1964 also had dramatic effects on the coastline. G. Plafker, *The Alaska Earthquake, March 27, 1964, Regional Effects, Tectonics*, United States Geological Survey Professional Paper No. 543-1 (U.S. Gov't Printing Office 1969).

See Brief of Pl. at 6, 25-27; see also *United States v. California*, 381 U.S. 139, 176-77 (1965) ("*California II*"); *United States v. Louisiana*, 394 U.S. 11, 40 n.48 (1968) ("*Louisiana Boundary Case*") (artificial coastal accretions modify the coastline even when not permitted by the Army Corps).<sup>2</sup> The grant of submerged lands to the States, and the principles interpreting the grant, are matters of federal law. As an administrative agency, the Army Corps may not alter the rights granted to the States by Congress. Cf. *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986) (where an act of Congress gives authority to the States, a federal agency cannot change that result; "only Congress can rewrite this statute").

The congressional allocation of rights between the States and the United States in the SLA controls the resolution of this case. The RHA confers no authority for the Army Corps to redistribute the balance of interests struck by Congress that reflect principles of federalism. See *Kake Village v. Egan*, 369 U.S. 60 (1961). In *Kake Village*, the Army Corps had issued permits under the RHA for certain Indian communities to operate fish traps. *Id.* at 63. However, these traps were illegal under State law, and this Court found that the Alaska Statehood Act granted responsibility for fisheries regulation to the State. As a result, the permitting authority of the Army Corps could have no effect on the State-Federal relationship established by the Statehood Act. *Id.* at 63, 76. Similarly, here the balance of federalism in the SLA confers certain rights

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<sup>2</sup> The ambulations are in accordance with fixed rules of international law. See *California II*, 381 U.S. at 176-77.

upon the States. The Army Corps' permitting authority cannot alter that balance.

**B. The Outer Continental Shelf Lands Act Does Not Take Precedence over the SLA**

The United States argues that the Army Corps may deny SLA grants to the States because of the Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 43 U.S.C.A. § 1331 (1986). The OCSLA provides that "the outer Continental Shelf is a vital *national* resource reserve held by the *Federal Government for the public*." Brief of Pl. at 25 (quoting 43 U.S.C. § 1332(3)) (emphasis added by United States). The United States argues that allowing coastal construction projects to extend the State's submerged lands into portions of the former outer continental shelf "would prejudice the rights of the national citizenry, in violation of the express policy of the Outer Continental Shelf Lands Act, in favor of the citizens of a single coastal State." Brief of Pl. at 25-26. Such a result, it contends, would be "at odds" with the "overriding purpose of protecting important national interests." *Id.*

Congress has not so spoken. To the contrary, the SLA and the OCSLA are in complete harmony. The "outer Continental Shelf" is defined within the SLA as "that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title. . . ." 43 U.S.C.A. § 1302 (1986). The OCSLA incorporates the same language. 43 U.S.C.A. § 1331(a) (1986). See also *Zabel v. Tabb*, 430 F.2d 199, 205 (5th Cir. 1970), cert.

*denied*, 401 U.S. 910 (1971) ("The [SLA] and this relinquishment [of title from the United States to the States] reflect the legislative compromise found in the combination of the Submerged Lands Act and the Outer Continental Shelf Act.").

Thus, the United States' asserted "vital national interest" in a fixed boundary for the outer continental shelf is illusory. By definition, the outer continental shelf automatically lies outside the seaward limit of a State's submerged lands. Congress has determined that the national interest is served by three miles of state-owned submerged lands, 43 U.S.C.A. § 1311(a)(1) (1986), and by an outer continental shelf which begins beyond this State boundary. 43 U.S.C.A. § 1332(3) (1986). Given the United States' admission that the Army Corps must adhere to acts of Congress in its permitting decisions, Brief of Pl. at 21-22, the declaration of the public interest in the SLA conclusively resolves this case in Alaska's favor.

### **C. The Army Corps' Disclaimer Requirement Contravenes the Public Policy of a Single Coastline**

The unilateral action of the Army Corps under the RHA to demand disclaimers creates an uncertain coastline. This "would create uncertainty and encourage controversy" contrary to the "public policy of a single coastline."<sup>3</sup> Offshore jurisdiction becomes uncertain. To

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<sup>3</sup> *Louisiana Boundary Case*, 394 U.S. at 34. See also *California II*, 381 U.S. at 165-66; *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988) (extolling the benefit of "uniformity and certainty, and ease of application" in rules establishing tideland boundaries).

determine jurisdiction, mariners will need to know whether or not a coastal addition has been the subject of a disclaimer. Disclaimers, however, do not appear on navigation charts.<sup>4</sup>

The SLA not only encompasses ownership of submerged lands but also reaches management of natural resources within the lands and waters. 43 U.S.C.A. § 1311(a)(1) (1986). Unstable and unpredictable administrative rules will create confusion in many areas. For example, States manage fishing operations within the three-mile limit, and the United States has jurisdiction over fishing activities outside "the seaward boundary of

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<sup>4</sup> The discovery of the existence of disclaimers is made more formidable because projects initially permitted without waivers are sometimes later subjected to waiver requirements. See, e.g., Lodging of the Parties at no. 5 (West Dock, Alaska Phase III (Dec. 1, 1980): disclaimer requested for this final phase required that Alaska disclaim title to the earlier submerged lands accretions). Thousands of other existing coastal projects could become subject to the Army Corps' retroactive disclaimer practice as new permits are needed for extensions, modifications, repairs, etc. See, e.g., *United States v. California*, 432 U.S. 40, 41-42 (1977) (listing of 20 artificial structures).



each of the coastal States."<sup>5</sup> Salvage operations<sup>6</sup> and criminal jurisdiction<sup>7</sup> are also affected.

The United States asserts that the single boundary policy can be the subject of "agreement between the parties." Brief of Pl. at 26 (citing *California II*, 381 U.S. at 176). The United States misconstrues this Court's suggestion in *California II*. While both *California II* and the *Louisiana Boundary Case* speak of agreements between the parties which could freeze the coastline, both cases also embrace a strict adherence to the public policy of a single coastline. *Louisiana Boundary Case*, 394 U.S. at 34; *California II*, 381 U.S. at 176. The certainty sought by this Court can be achieved only by comprehensive agreements which establish an historical, or otherwise identifiable, single coastline for an entire State. This Court did not

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<sup>5</sup> See Magnuson Fishery Conservation and Management Act of 1977, 16 U.S.C.A. § 1811 (1985). The United States claims jurisdiction over all fish within the exclusive economic zone ("EEZ") to 200 miles. The EEZ begins at "a line coterminous with the seaward boundary of each of the coastal States." *Id.* at § 1802(6) (Supp. 1991). The States' fisheries jurisdiction extends to the same seaward boundary at three miles. See, e.g., Alaska Stat. 44.03.010 (1989); *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 469 U.S. 823 (1984); *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1982).

<sup>6</sup> See Abandoned Shipwreck Act of 1987, 43 U.S.C.A. § 2101 (Supp. 1991) ("The Congress finds that - (a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and (b) included in the range of resources are certain abandoned shipwrecks . . .").

<sup>7</sup> See, e.g., *Corbin v. State*, 672 P.2d 156 (Alaska 1983), *appeal dismissed*, 467 U.S. 1223 (1984).

endorse adoption of random coastal disclaimers which abrogate the certainty of the single coastline formula. Moreover, nothing in the language of *California II* or the *Louisiana Boundary Case* suggests that such agreements are possible without congressional amendment of the SLA.

Finally, even if agreements are allowable under current law, *California II* did not authorize the Army Corps unilaterally to freeze the coastline as a condition for coastal development. See 381 U.S. at 176. Other than the disclaimer, Nome satisfied the conditions for its causeway. Joint Stipulation of Facts at 2-3. No further negotiation or agreement, especially with third parties, is necessary. In addition, without specific legislation, the Army Corps lacks authority to enter into negotiations or agreements regarding the location of the coastline for SLA purposes. The Army Corps has authority to issue permits under the RHA, not to negotiate rights under the SLA.

**D. Exceptions in the SLA Do Not Authorize the Army Corps to Require Waivers of States' Rights**

The United States mentions that the SLA "expressly retained 'all [of the United States'] navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.'" Brief of Pl. at 6 (quoting 43 U.S.C. § 1314). These exceptions provide no support to the United States' position. To the contrary, these exceptions prove the rule that the Army Corps has no authority to interfere in SLA grants.

The United States does not dispute that the rationale of the Army Corps in requiring this disclaimer has nothing to do with commerce, navigation, national defense, or international affairs. *See, e.g.*, Brief of Pl. at 25-26. It is a rule of statutory construction that when statutes include specific terms, terms not included in the enumeration are presumptively excluded. 2A N. Singer, *Sutherland Statutory Construction* § 47.23 (4th ed. 1984) ("The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded."). Had Congress wished to make an exception to the SLA for alterations in the State-Federal boundary, it could have done so in the statute.

**E. Congress' Grant of Submerged Lands and the Declaration of the Public Interest in the SLA Preclude the Army Corps from Demanding Disclaimers as a Condition for Coastal Development**

In conclusion, this case is entirely controlled by the SLA. In the SLA, Congress has already balanced the public interest:

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be . . . recognized, confirmed, established, and vested in and assigned to the respective States . . . .

43 U.S.C.A. § 1311(a)(1) (1986).

Here, the Army Corps withheld a permit for a coastal construction project solely to prevent a statutory grant of submerged lands. See Joint Stipulation of Facts at 2-3, 18a-19a, 22a-23a, 24a, 33a-37a; Brief of Pl. at 12. Lacking any statutory authority for this action, the Army Corps has baldly asserted that it "balanc[ed] the favorable impacts against the detrimental impacts" in its reapportionment of SLA rights. Brief of Pl. at 22 (quoting 33 C.F.R. § 320.1). See also *id.* at 13-14, 23-25. However, no balancing has occurred here. Instead, the Army Corps has ignored the overwhelming "favorable impacts" of the Nome Causeway, and chosen to focus only on a supposed "public interest" in preserving the existing State-Federal boundary. Far from being a pre-decisional balancing, the Army Corps' "public interest" review is a *fait accompli*.

Congress, not the Army Corps, defines the public interest. Accordingly, the Army Corps may not substitute its judgment for that of Congress and require that States disclaim their interests in submerged lands as a condition to coastal construction permits. The disclaimer required of Alaska is therefore void. Title to the submerged lands should be determined in accordance with the SLA.

## II. NEITHER THE RHA NOR OTHER ACTS OF CONGRESS PERMIT THE ARMY CORPS TO DENY THE NOME CAUSEWAY APPLICATION ON THE BASIS OF CHANGES TO THE STATE-FEDERAL BOUNDARY

The United States argues that the RHA grants the Secretary of the Army ("Secretary") broad discretion to deny applications for coastal construction projects that

affect the State-Federal offshore boundary. However, the SLA does not permit the Army Corps to negate the States' submerged lands entitlements. Therefore, this Court need not reach the issue of the scope of the Secretary's authority under the RHA. Nevertheless, even disregarding the preclusive effect of the SLA, the RHA, especially when read in conjunction with other acts of Congress, does not permit the Secretary to deny permits solely because of changing State-Federal boundaries.

**A. The RHA Explicitly Limits Permitting Decisions to Consideration of "Navigable Capacity"**

The United States argues that Section 10 of the RHA "commits the identification of relevant factors to the discretion of the Secretary of the Army." Brief of Pl. at 16. Alaska agrees that the Secretary of the Army may undertake a public interest review prior to issuing permits under the RHA and that the Secretary has discretion in issuing permits. Here, however, the Secretary has abused his discretion by considering factors which no congressional statute authorizes him to consider.

The United States' attempt to confer extra-statutory discretion on the Secretary ignores the important qualification that Section 10 of the RHA concerns obstructions "to the navigable capacity of any of the waters of the United States." 33 U.S.C.A. § 403 (1986). The Army Corps itself traditionally has acknowledged that its authority under the RHA must focus on navigational issues. *See* 42 Fed. Reg. 37,122 (1977) ("Until 1968, the Corps administered the 1899 Act regulatory program only to protect navigation and the navigable capacity of the nation's

waters."); Brief of Pl. at 22. *See also Wisconsin v. Illinois*, 278 U.S. 399, 418 (1928) (noting "the limited scope of the Secretary's authority" under the RHA, and that the Army Corps could not make local sanitation a basis for a permit under Section 10 of the RHA unless it had a concomitant benefit on navigation). *Cf. Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress"); *United States v. Chicago, M., St.P. & P. R.R.*, 282 U.S. 311, 326 (1930) (Interstate Commerce Commission, when authorizing issuance of stock, could not impose a condition that "was not within the purview of the regulating power of the Commission").

Thus, decisions made under the aegis of the RHA must be grounded upon a concern for the integrity of the navigable waters or grounded upon other acts of Congress. Here, the United States admits that it denied the Nome causeway permit solely because of the project's effect on title to submerged lands. Brief at Pl. at 23-25. Such considerations are beyond the purview of the Army Corps' authority under the RHA.

#### **B. Other Statutes Also Limit the Secretary's Permitting Decisions**

In 1968, the Secretary of the Army revised and reorganized all regulations governing the permitting programs of the Army Corps. The revisions recognized that the Army Corps' permitting authority is limited by various statutes, including the RHA. *See* 42 Fed. Reg., *supra*, at 37,122. *See also* 33 Fed. Reg. 18,671 (1968) (coordination required because of the interrelationship of responsibilities of the Secretary of the Army under the RHA and



the Secretary of the Interior under the Federal Water Pollution Act, the Fish and Wildlife Coordination Act, and the Fish and Wildlife Act of 1956).

The "rapidly changing nature of the Corps' regulatory programs," 42 Fed. Reg., *supra*, at 37,122, was based on specific statutory authorities. The United States does not dispute the role of these statutes: "[t]he Secretary must now act in the face of an extensive body of federal law establishing, among other things, national policies concerning environmental matters and natural resource development." Brief of Pl. at 21-22. In fact, Plaintiff and Defendant provide nearly identical catalogs of these many laws that impact and limit the Army Corps' discretion. See Brief of Pl. at 22; Brief of Def. at 18-19; See also 51 Fed. Reg. 41,222-23 (1986).

Even before the advent of environmental awareness, this Court affirmed the impact of other statutes on the administration of the RHA. For example, in 1933, this Court decreed that the Army Corps, in considering a permit application under the RHA, could not disregard an act of Congress that affected the site of a proposed wharf. *United States ex rel. Greathouse v. Dern*, 289 U.S. 342 (1933) (where Congress acted to appropriate \$7,500,000 to build the George Washington Memorial Parkway, the Secretary of the Army could deny a permit under the RHA for the nonnavigable reason that a proposed wharf would be in the path of the Parkway construction).

The United States cites *United States v. Pennsylvania Indust. Chem. Corp.*, 411 U.S. 655 (1973), as "further reinforc[ing] the conclusion that the Secretary is not narrowly confined under Section 10 . . . to considering only factors

bearing on navigation." Brief of Pl. at 18. However, *Pennsylvania Chemical* was not a permitting case. Instead, this case merely held that the absence of implementing regulations does not preclude the Army Corps from instituting prosecutions under former Section 13 of the RHA (prohibiting the discharge or deposit of refuse into navigable waters). *Pennsylvania Chemical*, 411 U.S. at 669. In establishing the breadth of this prosecutorial discretion, this Court noted that, in the absence of clarifying regulations, the Secretary could decline to permit an activity even though it would "not injure anchorage and navigation." *Id.* at 662. Because *Pennsylvania Chemical* concerned prosecution, and not permitting, this Court did not elaborate on the scope of the Army Corps' permitting authority under the RHA.<sup>8</sup>

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<sup>8</sup> The United States also cites to *Jay v. Boyd*, 352 U.S. 345, 353-54 (1956), and *Webster v. Doe*, 486 U.S. 592, 600 (1988), in support of the Secretary's discretion. Brief of Pl. at 16-17. These cases are inapposite, as each represents instances of unreviewable discretion. The United States does not assert that the RHA grants unreviewable authority to the Army Corps. Indeed, no such assertion is possible. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-11 (1971) (administrative decisions are subject to judicial review except in two rare circumstances: (1) there is clear and convincing Congressional intent to restrict access to judicial review; (2) the statute is drawn in such broad terms that there is no law to apply). Thus, except in rare circumstances, "[t]he court is first required to decide whether the Secretary acted within the scope of his authority." *Id.* at 415. Indeed, in arguing that the Secretary can consider factors beyond navigation, the United States notes that " 'there must be a reason [for denying a permit].' " Brief of Pl. at 21 (quoting *Zabel*, 430 F.2d at 208).

Finally, contrary to the United States' contentions, there is no congressional void or silence that allows the Secretary to adopt his own public interest criteria outside of the statute. *See* Brief of Pl. at 14, 16. Indeed, the many congressional enactments affecting navigable waters give the Secretary ample guidelines for the implementation of the RHA. This Court should reaffirm the force of these authorities and their application to the Army Corps.

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### CONCLUSION

For the reasons given above and also as presented in the State of Alaska's Brief in Support of its Motion for Summary Judgment, this Court should grant Alaska's Motion for Summary Judgment and deny the United States' motion.

Respectfully submitted,

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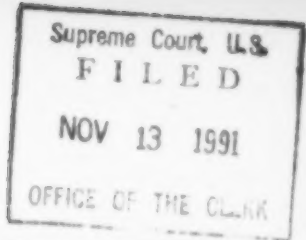
*Counsel for Defendant*

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# LODGING

No. 118, Original



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

---

LODGING OF PERMITS AND DISCLAIMERS

---

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148 Pk

Name of Project	Disclaimer Issued Date	Permit Date
1. Ventura Highway, California	02/19/70	02/25/70
2. East Cameron Jetties, Louisiana	08/31/70	12/04/70
3. West Dock Alaska (Phase I)	**	07/16/74
4. West Dock, Alaska (Phase II)	**	01/08/76
5. West Dock, Alaska (Phase III)	12/01/80	01/02/81
6. El Segundo, California	09/12/83	***
7. Endicott, Alaska	05/03/84	***
8. Holly Beach, Louisiana	02/25/85	02/25/85
9. Red Dog, Alaska	**	10/23/85
10. Cape Nome, Alaska	**	05/21/86
11. Cape Nome, Alaska (Permit modification)	**	11/04/86
12. Pea Island, North Carolina	06/28/89	06/22/89
13. Pt. McIntyre, Alaska	06/19/90	***
14. Collier County, Florida	07/13/90	04/05/90
15. Folly Beach, South Carolina	07/19/91	(not required project done by Army Corps)
16. Wainwright, Alaska	10/23/91	pending
17. Barrow/Browerville, Alaska	10/23/91	pending

\*\* no disclaimer requested

\*\*\* not retrieved from files or archives in time for first lodging



1. Ventura Highway, California

a. Disclaimer 02/19/70

b. Corps Permit 02/25/70

SEP 27 1966  
STATE LANDS DIVISION  
FBI State of California 95814

W-3914

AGREEMENT

Pursuant to Section 6301.7 of the Public Resources Code

WHEREAS, by virtue of its sovereignty the State is the owner of certain tidelands and submerged lands within the State;

WHEREAS, the State Lands Commission, pursuant to Section 6301 of the Public Resources Code:

"...has exclusive jurisdiction over all ungranted tidelands and submerged lands owned by the State..." ;

WHEREAS, the Department of Public Works, Division of Highways, in accordance with Section 101.5 of the Streets and Highways Code, has requested a right-of-way from the State Lands Commission for and for the protection of State Highway Route 07-Ven-101 which will entail the placement of approximately 2,800,000 cubic yards of fill on tide and submerged lands along the coast of the Pacific Ocean between Seacliff and Mussel Shoals, Ventura County, as shown on Division of Highways Map Nos. 19579c, 19580c, and 19581c on file in the office of the State Lands Commission;

WHEREAS, the proposed fill and construction of a freeway thereon could affect the location of the three-mile offshore ownership boundary of the State separating outer continental shelf lands of the United States from tide and submerged lands owned by the State of California;

WHEREAS, the United States Supreme Court in a Supplemental Decree in United States vs. California (Original No. 5) entered on January 31, 1966, decreed that the offshore ownership of the State boundary is located three geographical miles seaward from the nearest point or points on the "coast line" and that the term "coast line" means in part: (1) the line of mean lower low water on the mainland, (2) that line as heretofore or hereafter modified by natural or artificial means, and (3) the outermost permanent harbor works that form an integral part of the harbor system within the meaning of Article 8 of the Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639;

STATE OF CALIFORNIA  
OFFICIAL BUSINESS -  
-1-  
Presented pursuant to  
the provisions of  
the Government  
Code Section 6103.  
NO TAX DUE

1 WHEREAS, the State of California maintains that in the area of the  
2 proposed fill the offshore ownership boundary of the State is located three  
3 geographical miles from structures which qualify as outermost harbor works  
4 within the meaning of the Convention, while the United States contends that  
5 the offshore ownership boundary of the State in the area of the proposed  
6 fill is located three geographical miles from the line of mean lower low  
7 water and that the proposed fill and freeway would correspondingly move the  
8 offshore boundary seaward which in turn could cause jurisdiction over sub-  
9 merged lands previously held by the United States to be relinquished to the  
10 State of California, and to which the United States objects;

11 WHEREAS, such objection may be removed if the State of California agrees  
12 to waive any change in the boundary between State-owned submerged lands and  
13 outer continental shelf lands of the United States;

14 WHEREAS, Section 6301.7 of the Public Resources Code provides:

15 "The commission may negotiate with, and with the approval of the  
16 Governor, may enter into agreements with the United States, or any  
17 official, agency, licensee, permittee, or lessee thereof, concerning  
18 the effect, if any, of any then existing or proposed or projected  
19 fill, dredging, or construction operations or other activities on or  
20 adjacent to tide and submerged lands within the County of Ventura  
21 upon the boundary between state-owned submerged lands and the outer  
22 continental shelf lands under the jurisdiction of the United States,  
23 or concerning the location of such boundary. Such agreements may  
24 include, but are not limited to, a waiver on behalf of the State of  
25 California of any state-owned submerged lands which would otherwise  
26 inure to the state as a result of any such fill, dredging, or con-  
27 struction operations, or other activities. The commission shall,  
28 before entering into any such agreement, find that such agreement  
29 is in the public interest."

30 WHEREAS, the State Lands Commission at its regularly scheduled meeting  
31 on January 7, 1970, found and resolved:

32 "that the execution of a waiver on behalf of the State of Cali-  
33 fornia of any State-owned tide and submerged lands which would  
34 otherwise inure to the State as a result of a deposition of a fill  
35 in the waters of the Pacific Ocean, Ventura County, for State  
36 highway construction is in the public interest in that the con-  
37 struction represents an economic savings to the people of the State,  
38 as opposed to other alternatives."

39 NOW, THEREFORE, by virtue of Section 6301.7 of the Public Resources  
40 Code, the State by and through the State Lands Commission and with the  
41 approval of the Governor waives on behalf of the State of California any

1 State-owned tide and submerged lands which would otherwise inure to the  
2 State as a result of the deposition of a fill for and for the protection  
3 of State Highway Route 07-Ven-101 on tide and submerged lands between  
4 Sealcliff and Mussel Shoals, Ventura County, as shown on Division of Highways  
5 Maps Nos. 15879c, 15880c, and 15881c on file in the office of the State Lands  
6 Commission. This waiver shall be effective upon:

7 a. Receipt of written notification from the Bureau of Land Manage-  
8 ment, U. S. Department of the Interior, or other appropriate  
9 federal agency that the United States withdrew its objections  
10 to the fill area.

11 b. Receipt of authorization for the fill from the United States  
12 Government.

13 This agreement is solely a waiver of the effect, if any, of the place-  
14 ment of the fill and construction of State Highway Route 07-Ven-101, as  
15 shown on Division of Highways Map Nos. 19579c, 19580c, and 19581c on file  
16 in the office of the State Lands Commission, on the offshore ownership  
17 boundary of the State of California and is in no way an agreement as to  
18  
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1 the location of that boundary by either the State of California or the  
2 United States.

3  
4 Accepted:

5 UNITED STATES OF AMERICA

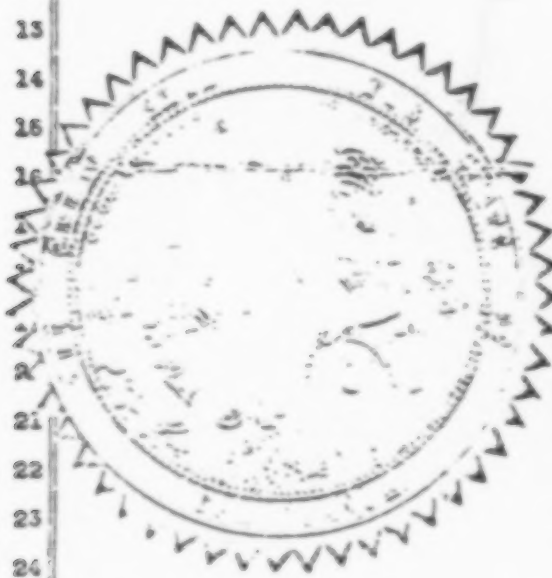
STATE OF CALIFORNIA  
Acting by and through  
STATE LANDS COMMISSION

6 By Walter H. Hudd

7 By J. J. Mortig  
8 J. J. MORTIG  
Executive Officer

9 Date JUN -4 1970

10 Date 2/19/70



11  
12  
13  
14 IN APPROVAL WHEREOF, I,  
15 RONALD REAGAN

Governor of the State of California  
have set my hand and caused the Seal  
of the State of California to be  
hereunto affixed pursuant to Section  
6301.7 of the Public Resources Code  
of the State of California. Given  
under my hand at the City of  
Sacramento, this, the 23 day of  
February in the year of  
our Lord one thousand nine hundred  
and seventy.

16  
17  
18  
19  
20  
21  
22  
23  
24 Ronald Reagan  
Governor of State

25 Attest:  
26  
27 Secretary of State

28 TOP. L. H.

29 APPROVED AS TO FORM:  
THOMAS C. LYNCH, ATTORNEY GENERAL  
30 By Warren J. Abbott  
31 Deputy Attorney General

RECORDED AT REQUEST OF  
AT 10 MIN. PAST 11 A.M.  
OFFICIAL RECORDS OF BUTTE COUNTY  
JUL - 6 1970

Robert L. H.

CONFIRMED COPY  
FREE

## DEPARTMENT OF THE ARMY

NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. ~~It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation.~~ (See *Cummings v. Chicago*, 185 U.S., 410.)

16-10100-2

### PERMIT

U. S. Army Engineer District, Los Angeles  
Corps of Engineers.

Los Angeles, California

25 February, 1970

State of California  
Division of Highways, District 7  
P. O. Box 2304  
Los Angeles, California 90054

Gentlemen:

Referring to written request dated 19 July 1968 for a permit to place 2,500,000 cubic yards of revetted earth fill in the Pacific Ocean.

I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army.

to place approximately 2,500,000 cubic yards of revetted earth fill to extend  
(Here describe the proposed structure or work.)

a maximum of 500 feet seaward from the mean high tide line between highway stations 425 and 510

in the Pacific Ocean

(Here to be named the river, harbor, or waterway concerned.)

at a location between 2.3 miles south of the Santa Barbara County line and 1.3 miles north of Route 33, Ventura County, California  
(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

in accordance with the plans shown on the drawing attached hereto in two sheets marked;  
(Or drawings: give file number or other definite identification marks.)

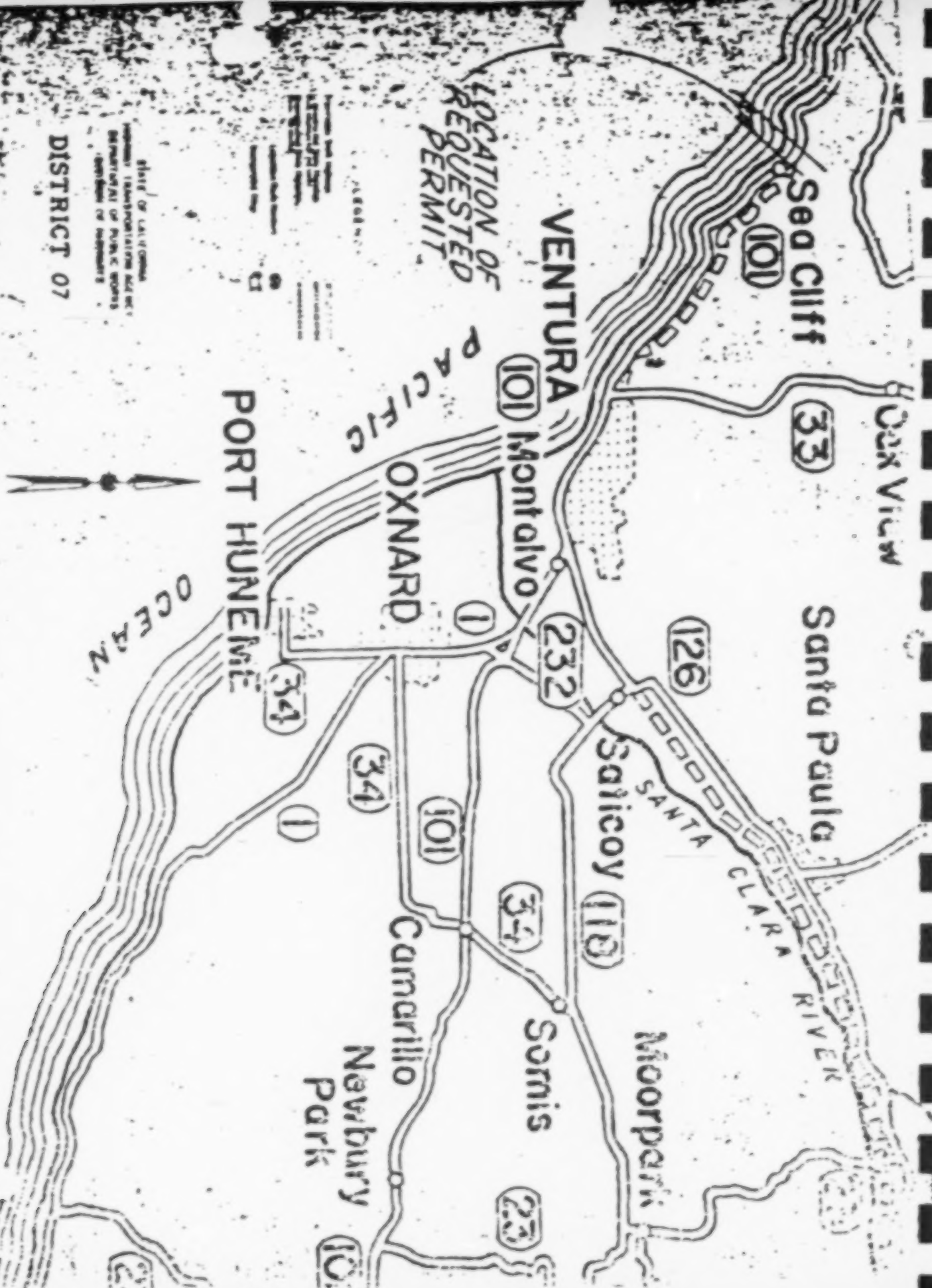
"State of Calif., Highway Transportation Agency, Dept. of Public Works, Div. of Highways, Dist. 07. Ven-101, Sta. 425 to 510."

subject to the following conditions:



DISTRICT 07

LOCATION OF  
REQUESTED  
PERMIT



(a) That the work shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the locality, who may temporarily suspend the work at any time, in his judgment the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material in the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

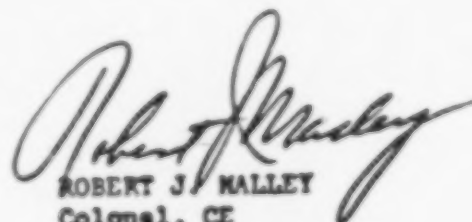
(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before 31st day of December, 1973, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

(k) That the permittee shall comply promptly with any regulations, conditions, or instructions affecting the work hereby authorized if and when issued by the Federal Water Pollution Control Administration and/or the State water pollution control agency having jurisdiction to abate or prevent water pollution. Such regulations, conditions or instructions in effect or prescribed by the Federal Water Pollution Control Administration or State agency are hereby made a condition of this permit.

By authority of the Secretary of the Army:

  
ROBERT J. MALLEY  
Colonel, CE  
District Engineer



2. East Cameron Jetties, Louisiana

a. Disclaimer 08/31/70

b. Corps Permit 12/04/70

AGREEMENT

WHEREAS, the East Cameron Port, Harbor and Terminal District, Grand Chenier, Louisiana, has applied to the Corps of Engineers, United States Army, for a permit to dredge a channel and construct protective jetties extending approximately 1400 feet into the Gulf of Mexico from the shore in Cameron Parish; and

WHEREAS, under the applicable law, the proposed jetties might affect the location of the coastline and boundary of the State of Louisiana, including the offshore boundary line between the outer continental shelf and the state-owned lands beneath navigable waters in the Gulf of Mexico; and

WHEREAS, the United States might for that reason refuse a permit for the project; and

WHEREAS, to avoid such refusal, the Legislature of the State of Louisiana has duly enacted Act No. 64 of 1970, which authorizes the East Cameron Port, Harbor and Terminal District "to enter into an agreement with the United States, with the approval of the governor and/or the attorney general, to provide that the construction, maintenance and operation of jetties in the Gulf of Mexico by said district shall not affect the location of the shoreline, coastline or boundary of the State of Louisiana"; and



NOW, THEREFORE, the State of Louisiana, acting by and through the East Cameron Port, Harbor and Terminal District, with the approval of the Attorney General of the State of Louisiana, pursuant to the authority granted to them by said Act No. 64 of 1970, declares and agrees as follows:

1. In consideration of the issuance by the Secretary of the Army of a permit for construction of a channel and jetties pursuant to the application filed by the East Cameron Port, Harbor and Terminal District on June 30, 1969, the State of Louisiana agrees that the shoreline, coastline, and boundaries of the State of Louisiana are not to be deemed to be in any way affected by the construction, maintenance, or operation of such jetties.

2. This agreement is executed solely for the purpose of removing an objection to the project referred to herein. It is not an admission by the State of Louisiana or by the United States as to the present location of the shoreline, coastline, or boundaries of the State of Louisiana, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. When executed for the State of Louisiana by the East Cameron Port, Harbor and Terminal District and approved by the Attorney General of the State of Louisiana, and when accepted for the United States by the Secretary of the Interior, this agreement shall become effective and binding upon



issuance by the Secretary of the Army of a permit for construction  
of the project referred to herein.

APPROVED:

*Jack P. Hemmilion*  
Attorney General  
(Title)  
*Aug 31 1970*  
(Date)

STATE OF LOUISIANA  
acting by and through the  
EAST CAMERON PORT, HARBOR  
AND TERMINAL DISTRICT

By:

Arnold C. Jones  
Chairman

(Title)

September 2, 1970  
(Date)

The United States accepts the foregoing agreement as  
eliminating any objection to the project referred to therein on  
account of its possible effect on the coastline or boundary of  
the State of Louisiana.

*Walter J. Hickel*

Walter J. Hickel  
Secretary of the Interior

SEP 30 1970  
(Date)

STATE OF LOUISIANA

PARISH OF CAMERON

I hereby certify that the above and foregoing is  
a true and correct copy of Resolution adopted and passed by  
the East Cameron Port, Harbor and Terminal District in Special  
Session convened on the 2nd day of September, 1970.

Cameron, Louisiana, this 9<sup>th</sup> day of September,  
1970.

*Garner Nung*

SECRETARY

EAST CAMERON PORT, HARBOR  
AND TERMINAL DISTRICT

JONES & JONES  
ATTORNEYS AT LAW  
CAMERON, LOUISIANA

September 4, 1970

JEAN G. JEE

Francis A. Cotter  
Office of the Solicitor  
Department of the Interior  
Washington, D. C. 20240

Re: East Cameron Port, Harbor  
and Terminal District,  
Cameron Parish, Louisiana

Dear Mr. Cotter:

I am pleased to enclose herewith the agreement by and between the State of Louisiana and the United States relative to the construction by the East Cameron Port, Harbor and Terminal District of a channel out into the Gulf of Mexico.

In accordance with our previous discussions, will you please have this agreement executed by Mr. Hickel and return three executed copies to us. We are sending a copy of this letter and the proposed agreement to the U. S. Corps of Engineers in New Orleans, Louisiana, and request that they now issue the permit to construct the jetties. It is our understanding that this is the last remaining obstacle to their issuing this permit.

Our people are most anxious to proceed, and we respectfully request your expediting this matter with the Department of Interior.

Francis A. Cotter

Page -2-

September 4, 1966

We also request that the Corps of Engineers please forward us the permit as soon as possible.

Sincerely yours,

JONES & JONES

J. B. JONES, JR.

JBJjr/cl

Encl.

cc: Corps of Engineers \*  
Jack P. F. Gremillion  
Oliver P. Stockwell  
Members of the Board  
East Cameron Port, Harbor  
and Terminal District

DEPARTMENT OF THE ARMY

PERMIT

LMNOD-SP (Gulf of Mexico) 1526

US ARMY ENGR DISTRICT, NEW ORLEANS  
NEW ORLEANS, LOUISIANA 4 December, 1970

Board of Commissioners  
East Cameron Port Harbor & Terminal District  
PO Box 46A  
Grand Chenier, La. 70643

LMNOD-SP  
1522-15  
Gulf of Mexico  
1526/2

P-70-A-3

Referring to written request dated 30 June 1969,

upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899 (33 U.S.C. 403), entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army

to dredge and maintain a channel (spoil to be deposited as shown on drawing) and install and maintain stone jetties,

in the Gulf of Mexico and Lower Mad Lake,

Copy to Chief of Engineers Div  
ATTN: Service Branch

at central to a point about 6.8 miles southeasterly from Oak Grove, La., in Cameron Parish,

in accordance with the plans and drawings attached hereto in one sheet, titled "Proposed Channel Dredging & Jetty Const. . . .", dated June 1969,

subject to the following conditions:

1. General Survey  
2. Operations

LMN Form 991 (Temp)  
Jun 70

Copy to Chief of Engineers Div  
ay to [signature] 12/15/70 4/26/71

LJUD-SP (Gulf of Mexico)1526

4 December 1970

(a) That this instrument does not convey any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State or local laws or regulations, nor does it obviate the necessity of obtaining State or local assent required by law for the structure or work authorized.

(b) That the structure or work authorized herein shall be in accordance with the plans and drawings attached hereto and construction shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the District in which the work is to be performed.

(c) That the District Engineer may at any time make such inspections as he may deem necessary to assure that the construction or work is performed in accordance with the conditions of this permit and all expenses thereof shall be borne by the permittee.

(d) That the permittee shall comply promptly with any lawful regulations, conditions, or instructions affecting the structure or work authorized herein if and when issued by the Federal Water Quality Administration and/or the State water pollution control agency having jurisdiction to abate or prevent water pollution, including thermal or radiation pollution. Such regulations, conditions or instructions in effect or hereafter prescribed by the Federal Water Quality Administration and/or the State agency are hereby made a condition of this permit.

(e) That the permittee will maintain the work authorized herein in good condition in accordance with the approved plans.

(f) That this permit may, prior to the completion of the structure or work authorized herein, be suspended by authority of the Secretary of the Army if it is determined that suspension is in the public interest.\*

(g) That this permit may at any time be modified by authority of the Secretary of the Army if it is determined that, under existing circumstances, modification is in the public interest.\* The permittee, upon receipt of a notice of modification, shall comply therewith as directed by the Secretary of the Army or his authorized representative.

(h) That this permit may be revoked by authority of the Secretary of the Army if the permittee fails to comply with any of its provisions or if the Secretary determines that, under the existing circumstances, such action is required in the public interest.\*

\*A judgment as to whether or not suspension, modification or revocation is in the public interest involves a consideration of the impact that any such action or the absence of any such action may have on factors affecting the public interest. Such factors include, but are not limited to navigation, fish and wildlife, water quality, economics, conservation, aesthetics, recreation, water supply, flood damage prevention, ecosystems and, in general, the needs and welfare of the people.



LAMOD-SP (Gulf of Mexico)1526  
4 December 19 70

(i) That any modification, suspension or revocation of this permit shall not be the basis for a claim for damages against the United States.

(j) That the United States shall in no way be liable for any damage to any structure or work authorized herein which may be caused by or result from future operations undertaken by the Government in the public interest.

(k) That no attempt shall be made by the permittee to forbid the full and free use by the public of all navigable waters at or adjacent to the structure or work authorized by this permit.

(l) That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

(m) That the permittee shall notify the District Engineer at what time the construction or work will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of its completion.

(n) That if the structure or work herein authorized is not completed on or before the thirty-first day of December, 19 73, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

(o) That the legal requirements of all Federal agencies be met.

(p) That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require action by the Congress or other agencies of the Federal Government.

(q) That all the provisions of this permit shall be binding on any assignee or successor in interest of the permittee.

(r) That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Registrar of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

(s) That the permittee agree to make every reasonable effort to prosecute the construction or work authorized herein in a manner so as to minimize any adverse impact of the construction or work on fish, wildlife and natural environmental values.

LAWD-SP (Gulf of Mexico) 1586  
4 December 1970

(t) That the permittee agrees that it will prosecute the construction of work authorized herein in a manner so as to minimize any degradation of water quality.

(u) That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States, at the direction of the Secretary of the Army and in such time and manner as the Secretary or his authorized representative may direct, restore the waterway to its former condition. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

(v) This authorization is wholly unconnected and unconnected with the ownership of or rights in the underlying soil and creates no property rights.

(v) This permit will terminate on 4 December 1971 unless the permittee submits to the District Engineer the certification provided for in Section 21(b)(8) of Public Law 91-224, Water Quality Improvement Act of 1970, within one year from the date of the permit.

By authority of the Secretary of the Army:

1 Incl  
Drawing

*C. J. Nettles*

4 December 1970  
Date

C. J. NETTLES  
Asst Chief, Operations Division  
for  
HERBERT R. HAAR, JR.  
Colonel, CE  
District Engineer

Permittee hereby accepts the terms and conditions of this permit.

*James Nung*  
Permitted  
Lieut. Secretary  
CAPM-TD

12-4-70  
Date



3. West Dock, Alaska, (Phase I)

a. Disclaimer      No disclaimer requested

b. Corps Permit    07/16/74

Application No. 1-176  
Agency AMC  
Effective Date 10 July 1974  
Expiration Date 31 Dec 77  
File No. Sanford 20 11

DEPARTMENT OF THE ARMY  
PERMIT

*DOC #13*

Referring to written request dated 11 April 1974 for a permit to perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the River and Harbor Act of March 3, 1899 (33 USC 403) and Section 203(b) of the Trans-Alaska Pipeline Authorization Act (PL 93-153).

ATLANTIC RICHFIELD COMPANY, PO Box 340, Anchorage, Alaska 99510,

\_\_\_\_\_ is hereby authorized by the Secretary of the Army  
to construct on, over, and under \_\_\_\_\_

to provide \_\_\_\_\_

to the satisfaction of \_\_\_\_\_

In accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit and marked: "PROPOSED DOCK & APPROACH IN PRUDHOE BAY AT NORTHEASTLY ANCHORAGE BY ATLANTIC RICHFIELD COMPANY, PO BOX 340, ANCHORAGE, ALASKA 99510; DATE: APRIL 23, 1974; SHEETS 1, 2, 3, 4."

subject to the following conditions: \_\_\_\_\_



I. GENERAL CONDITIONS:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions f. or g. hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate; whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

c. That the permittee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

d. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State or local laws or regulations, nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

e. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

f. That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein is necessary to protect navigation. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to protect navigation. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevant to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to the procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.



g. That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the interests of navigation. Any such modification, suspension or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and conditions of this permit did not, in fact, occur or, (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of the permit and is able to provide satisfactory assurances that future operations shall be in full compliance with the terms and conditions of this permit; or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

h. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

i. That any modification, suspension or revocation of this permit shall not be the basis for any claim for damages against the United States.

j. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

k. That if the activity authorized herein is not started on or before the 31st day of December, 19 76, and is not completed on or before the 31st day of December, 19 77, this permit, if not previously revoked or specifically extended, shall automatically expire.

l. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

m. That if the display of lights and signals on any structures or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

n. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

o. That if and when the permittee desires to abandon the activity authorized herein unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition r. hereof, he must restore the area to a condition satisfactory to the District Engineer.

p. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

q. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

r. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

See attached addendum which is incorporated herein by reference.  
This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

  
\_\_\_\_\_

7-12-74  
(DATE)

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

  
\_\_\_\_\_

CHARLES A. REBELIUS  
COLONEL, CORPS OF ENGINEERS  
DISTRICT ENGINEER

18 JUL 1974  
(DATE)

Transferee hereby agrees to comply with the terms and conditions of this permit:

\_\_\_\_\_  
(TRANSFEREE)

\_\_\_\_\_  
(DATE)

addendum to Department of the Army permit Atlantic Richfield Company,  
Barrow Sea 10

11. SPECIAL CONDITIONS:

(c) That the applicant shall establish appropriate baseline data prior to commencement of construction and shall develop and implement a marine environmental monitoring program to document the impact of the construction and operation of the docking facility on the environment. Said monitoring shall be continued for a minimum of three years after completion of the project or the discontinued use of the structure, whichever comes first.

(t) That the baseline collection and marine monitoring programs, and any subsequent changes thereof, shall have the approval of the Authorized Officer, Alaska Pipeline Office, Department of the Interior, who shall have access to all data and reports pertaining to the baseline and monitoring programs.

N

BEAUFORT  
SEA

Dock No. 2

20' x 150' on 700' interval

5410' E

1000'  
to 6' Water Depth

Future Locations for  
Additional Storage Pads

Initial Storage Pad  
Approx. 800,000 cu ft  
800' x 1000' x 8' Deep

17320'

TYRE  
LAT. 70° 52' 00"  
LONG. 149° 28' 55"  
IN 000,572.54  
TO 0,000,000.00

(Beaufort Sea 10)

PROPOSED DOCK & APPROACH

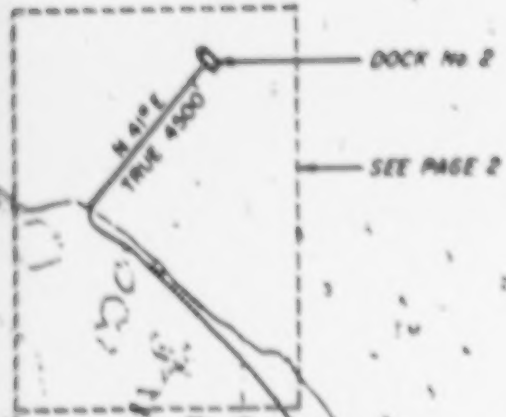
IN: Prudhoe Bay

AT: Northwestly Shore

BY: Atlantic Richfield Comp

PLAN

0 1000'  
Scale



Gull Island

Prudhoe Bay

(Beaufort Sea 10)

PROPOSED DOCK & APPROACH  
IN: Prudhoe Bay  
AT: Northwestern Shore  
BY: Atlantic Richfield Company

NAVY MAP







4. West Dock, Alaska, (Phase II)

a. Disclaimer      No disclaimer requested

b. Corps Permit    01/08/76

Application No. NPA 72-1

Doc# = 6  
M-7402-

Name of Applicant Atlantic Richfield Company

Effective Date 8 January 1976

Expiration Date (If applicable) N/A

File No. Beaufort Sea 10

DEPARTMENT OF THE ARMY  
PERMIT

Referring to written request dated 8 October 1975 for a permit to:

(k) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);

(j) Discharge dredged or fill material into navigable waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act (86 Stat. 816, P.L. 92-500);

(i) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052, P.L. 92-532).

Atlantic Richfield Company  
PO Box 360  
Anchorage, Alaska 99510

← (Here insert the full name and address of the permittee)

is hereby authorized by the Secretary of the Army:

to approve a revised plan to construct an  
extension of the Prudhoe Bay Dock Facility

← (Here describe the proposed structure or activity, and its intended use. In the case of an application for a fill permit, describe the structure, if any, proposed to be erected on the fill. In the case of an application for the discharge of dredged or fill material into navigable waters or the transportation for discharge in ocean waters of dredged material, describe the type and quantity of material to be discharged.)

Prudhoe Bay

← (Here to be named the ocean, river, harbor, or waterway concerned.)

Northwesterly Shore

← (Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the coast, stating whether above or below or giving direction by points of compass.)

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings give file number or other definite identification marks):

PROPOSED REVISED DOCK PLAN; IN: PRUDHOE BAY;  
AT: NORTHWESTERLY SHORE; BY: ATLANTIC RICHFIELD COMPANY, PO BOX 360,  
ANCHORAGE, ALASKA 99510; DATE: OCTOBER 8, 1975 SHEETS 1 THRU 4

subject to the following conditions:

1. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to Sections 301, 302, 306 and 307 of the Federal Water Pollution Control Act of 1972 (P.L. 92-500; 86 Stat. 816), or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge or deposit of dredged or fill material into navigable waters, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the permittee agrees to make every reasonable effort to prosecute the work authorized herein in a manner so as to minimize any adverse impact of the work on fish, wildlife and natural environmental values.

e. That the permittee agrees to prosecute the work authorized herein in a manner so as to minimize any degradation of water quality.

f. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

g. That the permittee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

h. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges, and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations, nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

i. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

j. That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevant to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

k. That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of the permit and is able to provide satisfactory assurances that future operations shall be in full compliance with the terms and conditions of this permit; or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not ~~ended~~ <sup>started</sup> on or before \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ (one year from the date of issuance of this permit unless otherwise specified) and is not completed on or before \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

p. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

q. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

r. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

s. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition v hereof, he must restore the area to a condition satisfactory to the District Engineer.

t. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

u. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

v. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and condition of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

The following Special Conditions will be applicable when appropriate:

W. **STRUCTURES FOR SMALL BOATS:** That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

~~DISCHARGE OF DREDGED MATERIAL INTO OCEAN WATERS:~~ That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or dumping of the dredged material as authorized herein.

X. **ERECTION OF STRUCTURE IN OR OVER NAVIGABLE WATERS:** That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

with this permit  
the permittee shall be  
responsible for  
any damage to  
the waterway or  
other property  
caused by the  
structure or work  
authorized herein.

MAINTENANCE DREDGING. (1) That when the work authorized herein includes periodic maintenance dredging, it may be carried out under this permit for \_\_\_\_\_ years from the date of issuance of this permit, but not more than \_\_\_\_\_ years unless otherwise indicated; and (2) That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

ii. Special Conditions (Here list conditions relating specifically to the proposed structure or work authorized by this permit):

- a. That the permittee shall certify that construction of the proposed structure in accordance with the inclosed plans is necessary because of a bona fide emergency.
- b. That explosives shall not be used in the construction of this structure without the prior consent of the Alaska Department of Fish and Game.
- c. That structure shall be removed by the permittee commencing on 30 June 1976, unless the permittee has satisfied the District Engineer of sufficient progress toward the following permit conditions:

(1) That the permittee shall conduct or bear the cost of conducting studies designed by the resource agencies to determine the environmental impact of the structure. Subject to the results of these studies and recommendations of the National Marine Fisheries Service, Fish and Wildlife Service, Environmental Protection Agency and/or agencies of the State of Alaska, based on these findings, the District Engineer may direct the permittee to leave in place, remove or modify the emergency structure.

(2) That the permittee shall prepare a plan that demonstrates that the facilities conform with an accepted and unitized long-range plan for marine cargo handling in the Prudhoe Bay area.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

[Signature]  
PERMITTEE TITLE JOE S  
ATTORNEY-IN-FACT

1-8-76  
DATE

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

[Signature]  
FOR CHARLES A. DEBELIUS  
Colonel, Corps of Engineers  
DISTRICT ENGINEER,  
U.S. ARMY, CORPS OF ENGINEERS

8 Jan 76  
DATE

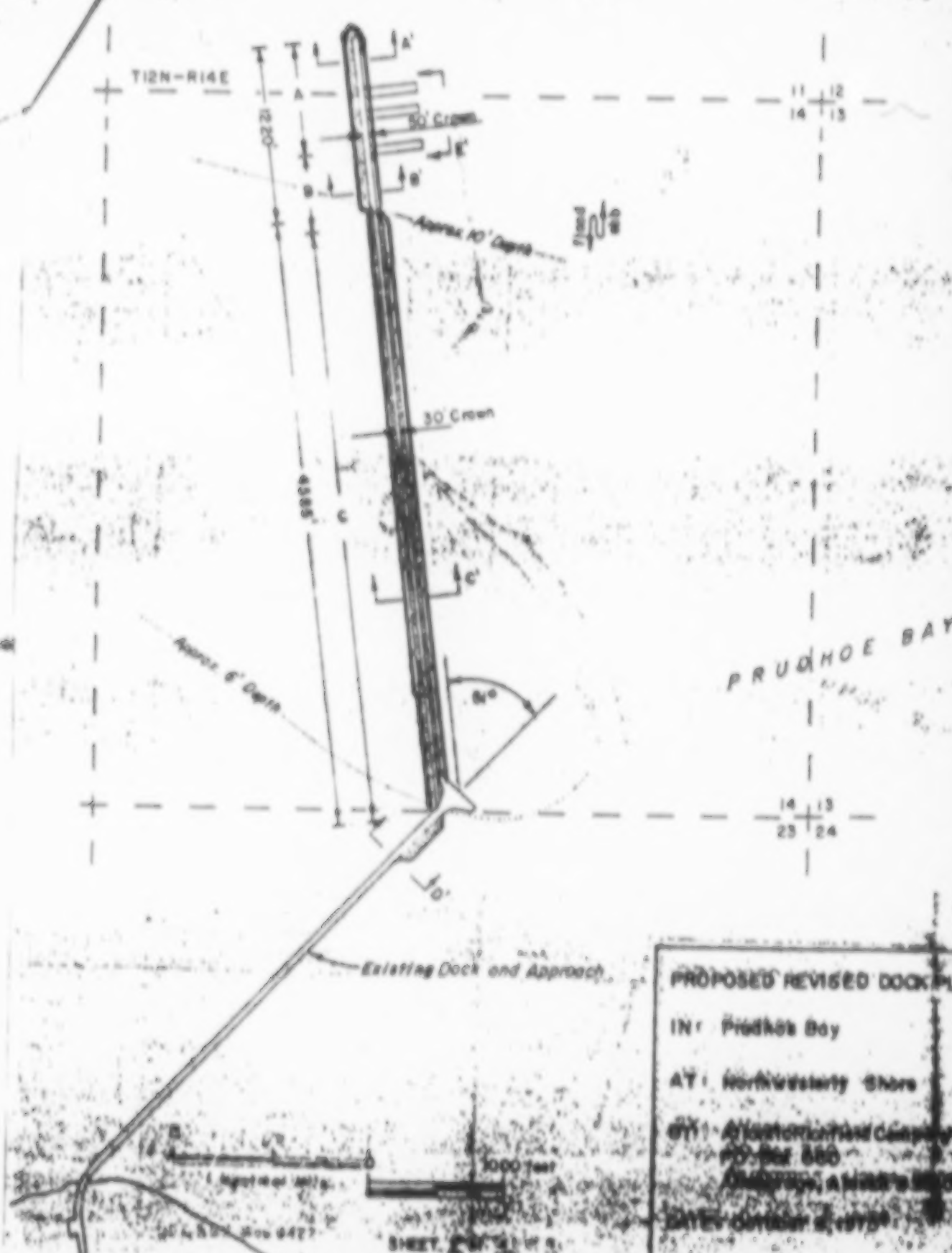
Transferee hereby agrees to comply with the terms and conditions of this permit.

\_\_\_\_\_  
TRANSFEREE

\_\_\_\_\_  
DATE



Structure without the  
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**PROPOSED REVISED DOCK PLAN**  
 IN: Prudhoe Bay  
 AT: Northwestern Shore  
 ON: Arctic Slope Regional Corporation  
 NO. 880  
 DRAWN: A. H. H. H.  
 DATE: October 1, 1978

SHEET 2 OF 3





radio 1972-3  
ide emergency  
without the  
3-11-81  
15. unless

**PROPOSED REVISED DOCK**

**IN: Prudhoe Bay**

**AT: Northwesterly Shore**

**BY: Atlantic Region  
PO. Box 360  
Anchorage, Alaska**

**DATE: October 8, 1975**

5. West Dock, Alaska, (Phase III)

a. Disclaimer 12/01/80

b. Corps Permit 01/02/81

Doc 12-

AGREEMENT

WHEREAS Atlantic Richfield Company (ARCO) and Sohio Alaska Petroleum Company (SOHIO) have applied to the United States Army Corps of Engineers for a permit to construct an extension of the existing ARCO dock at Prudhoe Bay;

WHEREAS, under the Submerged Lands Act, 43 U.S.C. Sections 1301 et seq., such an extension might affect the location of the coast line and boundary of the State of Alaska, including the offshore boundary line between the outer continental shelf and State-owned lands beneath navigable waters in the Beaufort Sea;

WHEREAS, under 33 CFR 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of Interior if a project for which a permit is sought might affect the coast line;

WHEREAS, the Corps of Engineers has consulted the Attorney General and Solicitor pursuant to 33 CFR 320.4(f);

WHEREAS the Corps of Engineers has been requested by the Attorney General and Solicitor to withhold approval of ARCO and SOHIO's permit application because of the potential effect on Alaska's coast line;

WHEREAS their objection to the permit application on this ground would be removed if a binding disclaimer is entered by the State of Alaska to the effect that the State does not, and will not, treat the extension as extending its coast line for purposes of the Submerged Lands Act;

WHEREAS the Alaska Attorney General, in a Formal Opinion dated October 29, 1987, concluded that the Alaska Commissioner of Natural Resources has the power to grant such a binding disclaimer;

WHEREAS, absent such a disclaimer, it appears that it will be at least 12 to 18 months before the United States Attorney General and the Solicitor of the Department of Interior will be in a position to consider removing their objection;

WHEREAS the project for which ARCO and SOHIO are seeking the Corps of Engineers' permit is an integral component of the proposed

waterflood project which will permit substantial secondary recovery from the existing Prudhoe Bay field;

WHEREAS it is in the State of Alaska's interest to obtain such secondary recovery;

WHEREAS, because of technical engineering considerations, it is in the State of Alaska's interest to avoid unnecessary delay in issuance of the Corps of Engineers' permit;

WHEREAS executing a binding disclaimer to the effect that the State of Alaska does not, and will not, treat the applied-for extension as extending the State's coast line for purposes of the Submerged Lands Act grant will eliminate any delay in permit issuance attributable to the consultation requirement of 33 CFR 320.4(f);

THEREFORE, the State of Alaska, acting by and through the Commissioner of Natural Resources, pursuant to the authority granted to him by Article VIII, Section 1 of the Alaska Constitution, AS 38.05.020(b), 38.05.027(a), 38.05.035(a)(14) and 38.05.315(a), declares and agrees as follows:

1. In consideration of the issuance, by the Secretary of the Army or his authorized representative, of a permit for construction of an extension to the ARCO dock at Prudhoe Bay for purposes of the waterflood project designed to result in substantial secondary recovery from the existing Prudhoe Bay oil and gas field, pursuant to the application filed by ARCO and SOHIO, the State of Alaska agrees that the shoreline, coast line, and boundaries of the State of Alaska are not to be deemed to be in any way affected by the construction, maintenance, or operation of such extension. This Agreement should be construed as a binding disclaimer by the State of Alaska to the effect that the State does not, and will not, treat the ARCO dock waterflood extension as extending its coast line for purposes of the Submerged Lands Act.

2. This Agreement is executed solely for the purpose of eliminating delay in the issuance of the permit sought by ARCO and SOHIO resulting from the requirement in 33 CFR 320.4(f) that the United States Army Corps of Engineers consult with the United States Attorney General and the Solicitor of the Department of Interior when a project for which a permit is sought might affect the coast line. It is not an admission

The United States accepts the foregoing Agreement (together with a companion Agreement dated \_\_\_\_\_ and signed by the Alaska Commissioner of Natural Resources, by which the State of Alaska disclaims any additional submerged lands to which the State might become entitled by virtue of the proposed extension of the ARCO dock as obviating any further requirement for consultation by the United States Army Corps of Engineers with the United States Attorney General and the Solicitor of the Department of Interior pursuant to 33 CFR 320.4(f) and as eliminating any objection to the project referred to therein on account of its possible effect on the coast line or boundary of the State of Alaska.

Benjamin Civiletti  
Benjamin Civiletti  
Attorney General  
United States of America

(date) 12/1/80

Clyde O. Mertz  
Clyde O. Mertz, Esq.  
Solicitor  
Department of the Interior  
United States of America

12-1-80  
(date)



WHEREAS Atlantic Richfield Company (ARCO) and Sohio Alaska Petroleum Company (SOHIO) have applied to the United States Army Corps of Engineers for a permit to construct an extension of the existing ARCO dock at Prudhoe Bay;

WHEREAS, under the Submerged Lands Act, 43 U.S.C. Sections 1301 et seq., such an extension might affect the location of the coast line and boundary of the State of Alaska, including the offshore boundary line between the outer continental shelf and State-owned lands beneath navigable waters in the Beaufort Sea;

WHEREAS, under 33 CFR 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of Interior if a project for which a permit is sought might affect the coast line;

WHEREAS, the Corps of Engineers has consulted the Attorney General and Solicitor pursuant to 33 CFR 320.4(f);

WHEREAS the Corps of Engineers has been requested by the Attorney General and Solicitor to withhold approval of ARCO and SOHIO's permit application because of the potential effect on Alaska's coast line;

WHEREAS their objection to the permit application on this ground would be removed if (1) a binding disclaimer is entered by the State of Alaska to the effect that the State does not, and will not, treat the extension as extending its coast line for purposes of the Submerged Lands Act and (2) the State agrees not to invoke the permit, if granted, or any work undertaken pursuant to it, as ratifying the previous extension of the ARCO dock or otherwise affecting the issue whether that extension is part of Alaska's coast line for purposes of the Submerged Lands Act, a question currently at issue in United States v. Alaska, United States Supreme Court No. 84 Original;

WHEREAS, by an Agreement dated \_\_\_\_\_ and signed by the Alaska Commissioner of Natural Resources, the State of Alaska has entered a binding disclaimer to the effect that the State does not, and will not, treat the extension as extending its coast line for purposes of the Submerged Lands Act;

WHEREAS, for the reasons set out in that disclaimer, it is in the State's interest to remove the Attorney General's and Solicitor's objection to ARCO and SOHIO's permit application;



THEREFORE, the State of Alaska, acting by and through the Attorney General, pursuant to the authority granted to him by AS 44.23.020(b)(1), (2) and (3), declares and agrees as follows:

1. In consideration of the issuance, by the Secretary of the Army or his authorized representative, of a permit for construction of an extension to the ARCO dock at Prudhoe Bay for purposes of the water-flood project designed to result in substantial secondary recovery from the existing Prudhoe Bay oil and gas field, pursuant to the application filed by ARCO and SOHIO, the State of Alaska agrees that it will not invoke the permit or any work undertaken pursuant to it as ratifying the previous extension of the ARCO dock or otherwise affecting the question whether that earlier extension is part of Alaska's coast line for purposes of the Submerged Lands Act, a question currently at issue in United States v. Alaska, United States Supreme Court No. 84-1559. Original.

2. This Agreement is executed solely for the purpose of eliminating delay in the issuance of the permit sought by ARCO and SOHIO resulting from the requirement in 33 CFR 320.4(f) that the United States Army Corps of Engineers consult with the United States Attorney General and the Solicitor of the Department of Interior when a project for which a permit is sought might affect the coast line. It is not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coast line, or boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. When executed for the State of Alaska by the Attorney General, and when accepted for the United States by the United States Attorney General and the Solicitor of the Department of Interior, this Agreement shall become effective and binding upon issuance by the Secretary of the Army or his authorized representative of a permit for construction of the project referred to herein.

STATE OF ALASKA

By: \_\_\_\_\_  
Wilson L. Condon  
Attorney General  
State of Alaska

\_\_\_\_\_  
(date)

by the State of Alaska or by the United States as to the present location of the shore or coast line, or boundary of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. When executed for the State of Alaska by the Commissioner of Natural Resources, and when accepted for the United States by the United States Attorney General and the Solicitor of the Department of Interior, this Agreement shall become effective and binding upon issuance by the Secretary of the Army or his authorized representative of a permit for construction of the project referred to herein.

STATE OF ALASKA

By:

Robert E. Lehesche  
Commissioner of Natural Resources  
State of Alaska

(date)

The United States accepts the foregoing Agreement (together with the companion Agreement dated \_\_\_\_\_ and signed by the Alaska Attorney General to the effect that the State of Alaska will not invoke the permit, or any work undertaken pursuant to it, as ratifying the previous extension of the ARCO dock or otherwise affecting the issue whether that extension is part of Alaska's coast line for purposes of the Submerged Lands Act, a question currently at issue in United States v. Alaska, United States Supreme Court No. 84 Original) as obviating any further requirement for consultation by the United States Army Corps of Engineers with the United States Attorney General and the Solicitor of the Department of Interior pursuant to 33 CFR 320.4(f) and as eliminating any objection to the project referred to therein on account of its possible effect on the coast line or boundary of the State of Alaska.

*Benjamin Civiletti*  
Benjamin Civiletti  
Attorney General  
United States of America

(date)

*Clyde V. Harts, Esq.*  
Clyde V. Harts, Esq.  
Solicitor  
Department of the Interior  
United States of America

(date)

5(a)6



United States Department of Justice  
Office of the Solicitor General  
Washington, D.C. 20530

December 19, 1980

Doc #12

REC'd 27 Dec 80  
HPS

Honorable Wilson L. Condon  
Attorney General  
Pouch K - State Capitol  
Juneau, Alaska 99811

Re: No. 84, Original, United States v. Alaska  
(Proposed West Dock extension, Prudhoe Bay)

Dear Mr. Attorney General:

I have today been advised by the Alaska District of the  
United States Corps of Engineers that they have received and are  
forwarding here copies of the two Agreements relating to the  
proposed further extension of the Prudhoe Bay West Dock, signed  
by the Alaska Commissioner of Natural Resources and the Alaska  
Attorney General. Pursuant to previous arrangements, I am  
accordingly now enclosing copies of the same documents signed by  
the United States Attorney General and the Solicitor of the  
Department of the Interior. I have, moreover, today advised the  
Corps of Engineers that, effective immediately, the objection  
previously interposed to the granting of a permit on the ground  
of the structure's possible effect on Alaska's Submerged Lands  
Act grant is withdrawn. *crally*

I am sure you join us in the satisfaction that, in a  
cooperative spirit, we have been able so promptly to clear the  
way for an important project in the general interest.

Sincerely,

*[Signature]*  
Louis F. Claiborne  
Deputy Solicitor General

cc: Clyde O. Marts, Esquire  
Solicitor  
Department of the Interior

Application No. 17,001 6-740201  
 Name of Applicant Atlantic Richfield Company  
15 JUN 1971  
 Effective Date \_\_\_\_\_  
 Expiration Date (if applicable) \_\_\_\_\_  
 File No. Braufort Sea 20

DEPARTMENT OF THE ARMY  
 PERMIT

Referring to written request dated 3 August 1970 for a permit to:  
 (X) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403).

(X) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act (86 Stat. 816, P.L. 92-500);  
 ( ) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052, P.L. 92-532).

Atlantic Richfield Company  
 P.O. Box 740  
 Anchorage, Alaska 99510

is hereby authorized by the Secretary of the Army  
 to a. Relocate Dockhead No. 3, 730' to the east,

b. Construct a 7,700-foot-long causeway north from Dockhead No. 3 with a 57-foot clearspan breach immediately north of Dockhead No. 3. Causeway will have a 40-foot top-width and sideslopes of 4H:1V.

(Description of work continued on page 1A)

in Braufort Bay Oilfield

in North Slope Borough, Alaska

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings, give file number or other definite identification marks.)

"PROPOSED BRAUFORE BAY UNIT WATERFLOOD PROJECT: LOCATION: NORTH SLOPE BOROUGH, STATE OF ALASKA: APPLICATION BY: ATLANTIC RICHFIELD COMPANY: DATE: DECEMBER 1970: 14 SHEETS"

subject to the following conditions:

1. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions; or a hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Federal Water Pollution Control Act of 1972 (P.L. 92-500, 86 Stat. 816), the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92-532, 86 Stat. 1092), or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant including dredged or fill material, into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementer or plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges, and that it does not authorize any injury to property or invasion of rights or any abridgement of Federal, State, or local laws or regulations nor does it relieve the requirement to obtain State or local assent required by law for the activity authorized herein.

j. That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevant to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

k. That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of a written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of this permit and is able to provide satisfactory assurances that future operations shall be in full compliance with the terms and conditions of this permit or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.



The following Special Conditions will be applicable when appropriate:

**STRUCTURES IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES**

a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters or adjacent to the activity authorized by this permit.

c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

e. Structures for Small Boats That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

**MAINTENANCE DREDGING**

a. That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for \_\_\_\_\_ years from the date of issuance of this permit (ten years unless otherwise indicated).

b. That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

**DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES**

a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the FWPCA and published in 40 CFR 230.

b. That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities.

c. That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution, and

d. That the discharge will not occur in a component of the National Wild and Scenic River System or in a component of a State wild and scenic river system.

**DUMPING OF DREDGED MATERIAL INTO OCEAN WATERS**

a. That the dumping will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220-228.

b. That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or dumping of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

Alfred DISTRICT ENGINEER  
PERMITTEE & TITLE

2 JAN 1981  
DATE

BY AUTHORITY OF THE SECRETARY OF THE ARMY

Lee R. Nelson

2 Jan 80  
DATE

LEE R. NELSON  
COLONEL, CORPS OF ENGINEERS

DISTRICT ENGINEER  
U.S. ARMY, CORPS OF ENGINEERS

Transferor hereby agrees to comply with the terms and conditions of this permit.

\_\_\_\_\_  
TRANSFEREE

\_\_\_\_\_  
DATE



d. That if the activity authorized herein is not started on or before ~~September 1, 1968~~ September 1, 1968 (one year from the date of issuance of this permit unless otherwise specified) and is not completed on or before September 1, 1971 (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

e. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

f. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition 1 hereof, he must restore the area to a condition satisfactory to the District Engineer.

g. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

h. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

i. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

11. Special Conditions: There are conditions relating specifically to the proposed structure or work authorized by this permit:

a. That the permittee shall fund a monitoring program designed to validate the information contained in the Environmental Impact Statement and to establish the actual effects of the Waterflood Project. The monitoring program shall be developed in consultation with local, State and Federal resource agencies, approved by the District Engineer, and managed by a disinterested third party. The scope of the monitoring program shall be reviewed annually and modified according to the results of previous monitoring. The monitoring program shall continue for the life of the project.

b. That the passage between the Sewer Treatment Plant and Stunt Island shall be dredged at the direction of the District Engineer if the monitoring program indicates that dredging would be desirable.

c. That all of the structures authorized by this permit shall be removed after completion of the waterflooding of the Prince Bay Oilfield. The District Engineer shall be notified 12 months before the anticipated completion of the waterflooding of the Prince Bay Oilfield, and a good and sufficient performance bond shall be posted at that time to insure that the structures are removed.

CONTINUATION OF DESCRIPTION OF WORK TO DEPARTMENT OF THE ARMY PERMIT  
HEADPORT SEA 20 (071-0YD-2-770291)

c. Construct a 430'x575' grave pad at the end of the causeway, with 5:1V side slopes,

d. Place a 150'x610' seawater treatment plant with intake structure on the pad,

e. Place a 24-inch-diameter outfall line beneath the seabed extending 720' north from the pad with a 24-inch-diameter diffuser extending an additional 210' north,

f. Place a 22-inch-diameter marine life return pipe beneath the seabed extending 310' east from the pad,

g. Raise and widen the existing causeway from the shoreline to Dockhead No. 3, and

h. Place two low pressure water pipelines, a fuel pipeline, and powerlines in the causeway from the shoreline to the seawater treatment plant.

All work being for the purpose of providing treated seawater for injection into the Prudhoe Bay Oilfield,

6. El Segundo, California

a. Disclaimer      09/12/83

b. Corps Permit      Not retrieved from files or  
archives in time for lodging

AGREEMENT

Pursuant to Section 6301.7 of the Public Resources Code, as amended

WHEREAS, by virtue of its sovereignty the State of California is the owner of certain tidelands and submerged lands within the State;

WHEREAS, the State Lands Commission, pursuant to Section 6201 of the Public Resources Code:

" . . . has exclusive jurisdiction over all ungranted tidelands and submerged lands owned by the State. . .";

WHEREAS, the State Lands Commission has amended Lease PRC 5574.1 to lease to Chevron U.S.A. Inc. a portion of the tide and submerged lands along the coast of the Pacific Ocean between the northerly and southerly boundaries of the City of El Segundo, County of Los Angeles, and Chevron U.S.A. Inc. intends to construct thereon a rock groin extending perpendicular from the coast seaward approximately 900 feet, as shown on plans on file in the offices of the State Lands Commission under Lease PRC 5574.1;

WHEREAS, construction of the proposed rock groin would affect the location of the three-mile offshore ownership boundary of the State separating outer continental shelf lands of the United States from tide and submerged

1 lands owned by the State of California;

2 WHEREAS, the United States Supreme Court in a  
3 Supplemental Decree in United States v. California (Original  
4 No. 5) entered on January 31, 1966, decreed that the  
5 offshore State ownership boundary is located three  
6 geographical miles seaward from the nearest point or points  
7 on the "coast line" and that the term "coast line" means  
8 in part: (1) the line of mean lower low water on the  
9 mainland, (2) that line as heretofore or hereafter modified  
10 by natural or artificial means, and (3) the outermost  
11 permanent harbor works that form an integral part of the  
12 harbor system within the meaning of Article 8 of the  
13 Convention on the Territorial Seas and the Contiguous Zone,  
14 T.I.A.S. No. 5639;

15 WHEREAS, when constructed, the proposed rock groin  
16 would become a salient qualifying basepoint from which to  
17 locate the three-mile offshore ownership boundary, with  
18 the effect of moving the boundary several hundred feet  
19 further seaward, and thereby transferring ownership of  
20 approximately 100 acres of Outer Continental Shelf lands  
21 of the United States into state ownership;

22 WHEREAS, therefore the United States has objected  
23 to the construction of the proposed rock groin;

24 WHEREAS, such objection may be removed if the  
25 State of California agrees to waive any change in the  
26 boundary between State-owned submerged lands and outer  
27 continental shelf lands of the United States, as a result

1 of construction of the proposed rock groin;

2 WHEREAS, Section 6301.7 of the Public Resources  
3 Code, as amended, provides:

4  
5 "The commission may negotiate with, and with the  
6 approval of the Governor, may enter into  
7 agreements with, the United States, or any  
8 official, agency, licensee, permittee, or lessee  
9 thereof, concerning the effect, if any, of any  
10 existing or proposed or projected fill, dredging,  
11 or construction operations or other activities  
12 on or adjacent to tide and submerged lands within  
13 the County of Los Angeles or Ventura upon the  
14 boundary between state-owned submerged lands and  
15 the outer continental shelf lands under the  
16 jurisdiction of the United States, or concerning  
17 the location of that boundary. The agreements  
18 may include, but are not limited to, a waiver  
19 on behalf of the State of California of any  
20 state-owned submerged lands which would otherwise  
21 inure to the state as a result of any such fill,  
22 dredging, or construction operations, or other  
23 activities. The commission shall before entering  
24 into any such agreement, find that the agreement  
25 is in the public interest."

26 WHEREAS, the State Lands Commission at its  
27 regularly scheduled meeting on August 25, 1983, approved  
28 "... the waiver of interest in the area created by the  
29 movement of offshore boundary as a result of the groin  
30 placement authorized under the amendment of Lease  
31 PRC 5574.1."

32 NOW, THEREFORE, by virtue of Section 6301.7 of  
33 the Public Resources Code, as amended, the State by and  
34 through the State Lands Commission and with the approval  
35 of the Governor waives on behalf of the State of California  
36 any State-owned tide and submerged lands which would  
37 otherwise inure to the state as a result of construction



1 of the proposed rock groin on tide and submerged lands  
2 leased by the State Lands Commission to Chevron U.S.A. Inc.,  
3 under Lease No. 5574.1, pursuant to plans on file in the  
4 office of the State Lands Commission.

5 This Agreement is solely a waiver of the effect,  
6 if any, of the construction of the rock groin as shown on  
7 plans submitted by Chevron U.S.A. Inc. on file in the office  
8 of the State Lands Commission under tide and submerged lands  
9 Lease PRC 5574.1, on the offshore ownership boundary of  
10 the State of California and is in no way an agreement as  
11 to the location of that boundary by either the State of  
12 California or the United States.

13 This Agreement is conditional upon construction  
14 of that groin authorized in State Lands Commission Lease

15 / /

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27 / /

1 PRC 5574.1, and shall be null and void if, for any reason,  
2 said groin is not constructed.

3 ACCEPTED:

4 UNITED STATES OF AMERICA

STATE OF CALIFORNIA  
acting by and through  
STATE LANDS COMMISSION

5  
6 By \_\_\_\_\_

By *Clair H. Hedrick*  
Clair H. Hedrick  
Executive Officer

7  
8 Date \_\_\_\_\_

Date 9-17-93

9 IN APPROVAL WHEREOF, I,  
GEORGE DEUKNEJIAN

10 Governor of the State of  
11 California have set my hand  
12 and caused the Seal of the State  
13 of California to be hereunto  
14 affixed pursuant to  
15 Section 6301.7 of the Public  
16 Resources Code of the State  
17 of California. Given under my  
18 hand at the City of Sacramento,  
19 this, the \_\_\_\_\_ day of  
20 \_\_\_\_\_, in the year  
21 of our Lord one thousand nine  
22 hundred and eighty-three.

23 \_\_\_\_\_  
Governor of State

24 Attest:

25 \_\_\_\_\_  
Secretary of State

26 APPROVED AS TO FORM:

27 JOHN VAN DE KAMP,  
ATTORNEY GENERAL

By *M. Byron Taylor*  
Assistant Attorney General

7. Endicott, Alaska

a. Disclaimer 05/03/84

b. Corps Permit Not retrieved from files or  
archives in time for lodging

## DISCLAIMER

WHEREAS, the Sohio Alaska Petroleum Company ("Sohio") has applied to the United States Army Corps of Engineers for a permit to construct the Endicott project causeway in the Beaufort Sea;

WHEREAS, the project for which Sohio is seeking the Corps of Engineers permit is fundamental to economic development of proven hydrocarbon reserves from state lands in the area;

WHEREAS, both statewide and nationwide benefits will be derived from the Endicott project through increased domestic energy supplies, increased revenues generated, and increased infrastructure on the North Slope;

WHEREAS, under the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., construction of such a facility might affect the location of the coast line and boundary of the State of Alaska, including the offshore boundary between the outer continental shelf and state-owned lands beneath navigable water;

WHEREAS, under 33 C.F.R. § 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of the Interior if a project for which a permit is sought might affect the coast line;

WHEREAS, the Corps of Engineers has consulted the Attorney General and the Solicitor pursuant to 33 C.F.R. § 320.4(f);

WHEREAS, the Corps of Engineers has been requested by the Attorney General and the Solicitor to withhold approval of Sohio's permit application because of the potential effect on Alaska's coast line;

WHEREAS, the Corps of Engineers has determined that it will not issue such a permit over the Attorney General's and the Solicitor's objections on this ground;

WHEREAS, the Attorney General's and the Solicitor's objections to the permit application on this ground would be removed if a binding disclaimer is entered by the State of Alaska to the effect that Alaska does not, and will not, treat the Endicott project causeway as extending its coast line for purposes of the Submerged Lands Act;

WHEREAS, the Alaska Attorney General, in a formal opinion dated October 29, 1980, concluded that the Alaska Commissioner of Natural Resources has the power to issue such a disclaimer;

WHEREAS, Alaska would enter such a disclaimer without objection if the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska and the United States disagree as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska would not enter such a disclaimer but for the Corps of Engineers' determination that it will not issue the permit unless such a disclaimer is entered, thereby removing the Attorney General's and the Solicitor's objections to issuance of the permit;

WHEREAS, it is neither in the United States' interest nor in Alaska's interest to delay construction of the Endicott project causeway while the question of the Corps of Engineers' legal authority to require such a disclaimer is resolved;

WHEREAS, this disclaimer is entered without prejudice to Alaska's right to file an appropriate action to determine whether the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit;

WHEREAS, this disclaimer is fully effective and binding upon the State of Alaska, but becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction that the Corps of Engineers does not have the legal authority to require such a disclaimer prior to issuing such a permit; and

WHEREAS, it is the intent of both the United States and Alaska that this disclaimer remove the Attorney General's and the Solicitor's objections to issuance of the permit for construction of the Endicott project causeway, thereby allowing the construction to proceed, while at the same time preserving both the United States' legitimate interest in not having Alaska's coast line extended if the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit and Alaska's interest in not being bound by such a disclaimer if the Corps of Engineers does not have such legal authority;

THEREFORE, the State of Alaska, acting by and through the Commissioner of Natural Resources, pursuant to the authority granted to the commissioner by arc. VIII, sec. 1 of the Alaska Constitution, AS 38.05.020(b), AS 38.05.027(a), AS 38.05.035(a)(14), and AS 38.05.0315(a), declares and agrees as follows:

1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the

construction, maintenance, or operations of the Endicott project causeway. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Endicott project causeway as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

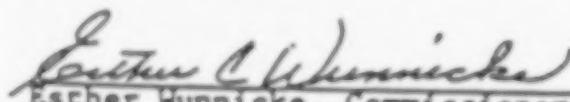
2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Attorney General and maintains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coast line, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. This disclaimer is entered without prejudice to Alaska's right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

4. This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

DATED: May 31, 1984.

STATE OF ALASKA

  
\_\_\_\_\_  
Esther Wunnicke, Commissioner  
Department of Natural Resources



8. Holly Beach, Louisiana

Disclaimer/Corps Permit , 02/25/81

M

501/24

1. Following to written request dated October 22, 1952 for a permit to  
 (1) Purging work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers  
 pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403)  
 (2) Discharging dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the  
 Army pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403)  
 (3) Discharging dredged or fill material into waters of the United States upon the issuance of a permit from the  
 Secretary of the Army pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403)  
 (4) Discharging dredged or fill material into waters of the United States upon the issuance of a permit from the  
 Secretary of the Army pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403)

Insulinic Department of  
Transportation and Development  
Office of Airports  
Main Office 10000, Capital Station  
Main 10000, Louisiana 70000  
... daily under the direction of the group  
to ... and maintain ... for ... control,

in the case of Justice,

② near Holly Beach, Louisiana; in Caspian variety.

to correspond with the plans and drawings collected herein which are incorporated in and made a part of this report in their  
entirety, give the number or other distinctive identification number. (a) from 1900 to 1910; (b) 1911 to 1920; (c) 1921 to 1930; (d) 1931 to 1940; (e) 1941 to 1950; (f) 1951 to 1960; (g) 1961 to 1970; (h) 1971 to 1980; (i) 1981 to 1990; (j) 1991 to 2000; (k) 2001 to 2010; (l) 2011 to 2020; (m) 2021 to 2030; (n) 2031 to 2040; (o) 2041 to 2050; (p) 2051 to 2060; (q) 2061 to 2070; (r) 2071 to 2080; (s) 2081 to 2090; (t) 2091 to 2100; (u) 2101 to 2110; (v) 2111 to 2120; (w) 2121 to 2130; (x) 2131 to 2140; (y) 2141 to 2150; (z) 2151 to 2160; (aa) 2161 to 2170; (ab) 2171 to 2180; (ac) 2181 to 2190; (ad) 2191 to 2200; (ae) 2201 to 2210; (af) 2211 to 2220; (ag) 2221 to 2230; (ah) 2231 to 2240; (ai) 2241 to 2250; (aj) 2251 to 2260; (ak) 2261 to 2270; (al) 2271 to 2280; (am) 2281 to 2290; (an) 2291 to 2300; (ao) 2301 to 2310; (ap) 2311 to 2320; (aq) 2321 to 2330; (ar) 2331 to 2340; (as) 2341 to 2350; (at) 2351 to 2360; (au) 2361 to 2370; (av) 2371 to 2380; (aw) 2381 to 2390; (ax) 2391 to 2400; (ay) 2401 to 2410; (az) 2411 to 2420; (ba) 2421 to 2430; (bb) 2431 to 2440; (bc) 2441 to 2450; (bd) 2451 to 2460; (be) 2461 to 2470; (bf) 2471 to 2480; (bg) 2481 to 2490; (bh) 2491 to 2500; (bi) 2501 to 2510; (bj) 2511 to 2520; (bk) 2521 to 2530; (bl) 2531 to 2540; (bm) 2541 to 2550; (bn) 2551 to 2560; (bo) 2561 to 2570; (bp) 2571 to 2580; (bq) 2581 to 2590; (br) 2591 to 2600; (bs) 2601 to 2610; (bt) 2611 to 2620; (bu) 2621 to 2630; (bv) 2631 to 2640; (bw) 2641 to 2650; (bx) 2651 to 2660; (by) 2661 to 2670; (bz) 2671 to 2680; (ca) 2681 to 2690; (cb) 2691 to 2700; (cc) 2701 to 2710; (cd) 2711 to 2720; (ce) 2721 to 2730; (cf) 2731 to 2740; (cg) 2741 to 2750; (ch) 2751 to 2760; (ci) 2761 to 2770; (cj) 2771 to 2780; (ck) 2781 to 2790; (cl) 2791 to 2800; (cm) 2801 to 2810; (cn) 2811 to 2820; (co) 2821 to 2830; (cp) 2831 to 2840; (cq) 2841 to 2850; (cr) 2851 to 2860; (cs) 2861 to 2870; (ct) 2871 to 2880; (cu) 2881 to 2890; (cv) 2891 to 2900; (cw) 2901 to 2910; (cx) 2911 to 2920; (cy) 2921 to 2930; (cz) 2931 to 2940; (da) 2941 to 2950; (db) 2951 to 2960; (dc) 2961 to 2970; (dd) 2971 to 2980; (de) 2981 to 2990; (df) 2991 to 3000; (dg) 3001 to 3010; (dh) 3011 to 3020; (di) 3021 to 3030; (dj) 3031 to 3040; (dk) 3041 to 3050; (dl) 3051 to 3060; (dm) 3061 to 3070; (dn) 3071 to 3080; (do) 3081 to 3090; (dp) 3091 to 3100; (dq) 3101 to 3110; (dr) 3111 to 3120; (ds) 3121 to 3130; (dt) 3131 to 3140; (du) 3141 to 3150; (dv) 3151 to 3160; (dw) 3161 to 3170; (dx) 3171 to 3180; (dy) 3181 to 3190; (dz) 3191 to 3200; (ea) 3201 to 3210; (eb) 3211 to 3220; (ec) 3221 to 3230; (ed) 3231 to 3240; (ee) 3241 to 3250; (ef) 3251 to 3260; (eg) 3261 to 3270; (eh) 3271 to 3280; (ei) 3281 to 3290; (ej) 3291 to 3300; (ek) 3301 to 3310; (el) 3311 to 3320; (em) 3321 to 3330; (en) 3331 to 3340; (eo) 3341 to 3350; (ep) 3351 to 3360; (eq) 3361 to 3370; (er) 3371 to 3380; (es) 3381 to 3390; (et) 3391 to 3400; (eu) 3401 to 3410; (ev) 3411 to 3420; (ew) 3421 to 3430; (ex) 3431 to 3440; (ey) 3441 to 3450; (ez) 3451 to 3460; (fa) 3461 to 3470; (fb) 3471 to 3480; (fc) 3481 to 3490; (fd) 3491 to 3500; (fe) 3501 to 3510; (ff) 3511 to 3520; (fg) 3521 to 3530; (fh) 3531 to 3540; (fi) 3541 to 3550; (fj) 3551 to 3560; (fk) 3561 to 3570; (fl) 3571 to 3580; (fm) 3581 to 3590; (fn) 3591 to 3600; (fo) 3601 to 3610; (fp) 3611 to 3620; (fq) 3621 to 3630; (fr) 3631 to 3640; (fs) 3641 to 3650; (ft) 3651 to 3660; (fu) 3661 to 3670; (fv) 3671 to 3680; (fw) 3681 to 3690; (fx) 3691 to 3700; (fy) 3701 to 3710; (fz) 3711 to 3720; (ga) 3721 to 3730; (gb) 3731 to 3740; (gc) 3741 to 3750; (gd) 3751 to 3760; (ge) 3761 to 3770; (gf) 3771 to 3780; (gg) 3781 to 3790; (gh) 3791 to 3800; (gi) 3801 to 3810; (gj) 3811 to 3820; (gk) 3821 to 3830; (gl) 3831 to 3840; (gm) 3841 to 3850; (gn) 3851 to 3860; (go) 3861 to 3870; (gp) 3871 to 3880; (gq) 3881 to 3890; (gr) 3891 to 3900; (gs) 3901 to 3910; (gt) 3911 to 3920; (gu) 3921 to 3930; (gv) 3931 to 3940; (gw) 3941 to 3950; (gx) 3951 to 3960; (gy) 3961 to 3970; (gz) 3971 to 3980; (ha) 3981 to 3990; (hb) 3991 to 4000; (hc) 4001 to 4010; (hd) 4011 to 4020; (he) 4021 to 4030; (hf) 4031 to 4040; (hg) 4041 to 4050; (hh) 4051 to 4060; (hi) 4061 to 4070; (hj) 4071 to 4080; (hk) 4081 to 4090; (hl) 4091 to 4100; (hm) 4101 to 4110; (hn) 4111 to 4120; (ho) 4121 to 4130; (hp) 4131 to 4140; (hq) 4141 to 4150; (hr) 4151 to 4160; (hs) 4161 to 4170; (ht) 4171 to 4180; (hu) 4181 to 4190; (hv) 4191 to 4200; (hw) 4201 to 4210; (hx) 4211 to 4220; (hy) 4221 to 4230; (hz) 4231 to 4240; (ia) 4241 to 4250; (ib) 4251 to 4260; (ic) 4261 to 4270; (id) 4271 to 4280; (ie) 4281 to 4290; (if) 4291 to 4300; (ig) 4301 to 4310; (ih) 4311 to 4320; (ii) 4321 to 4330; (ij) 4331 to 4340; (ik) 4341 to 4350; (il) 4351 to 4360; (im) 4361 to 4370; (in) 4371 to 4380; (io) 4381 to 4390; (ip) 4391 to 4400; (iq) 4401 to 4410; (ir) 4411 to 4420; (is) 4421 to 4430; (it) 4431 to 4440; (iu) 4441 to 4450; (iv) 4451 to 4460; (iw) 4461 to 4470; (ix) 4471 to 4480; (iy) 4481 to 4490; (iz) 4491 to 4500; (ja) 4501 to 4510; (jb) 4511 to 4520; (jc) 4521 to 4530; (jd) 4531 to 4540; (je) 4541 to 4550; (jf) 4551 to 4560; (jg) 4561 to 4570; (jh) 4571 to 4580; (ji) 4581 to 4590; (jj) 4591 to 4600;

COMING USCG

COMING NEXT WEEK

\_\_\_\_\_

\_\_\_\_\_

[illegible]

FEMA FORM 1751, Sep 82

U.S. Department of Commerce, NOAA  
National Marine Fisheries Service  
P.O. Box 370  
P.O. Box 370  
Lynn, Virginia 22610

4444

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into navigable United States or other waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, prohibition standards and discharge limits provided or set forth in the Clean Water Act (96 U.S.C. 860), the Marine Protection, Research and Monitoring Act of 1972 (P.L. 92-583) or laws, orders or permits for applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation, or any pollutant contained therein or its residue, into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any discharge or prohibition of water quality standards, or as directed by an implementation plan submitted to such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be necessary under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to provide the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife and natural environmental values.

f. That the permittee agrees that he will provide the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall advise the District Engineer or his authorized representative or designated agent in writing in advance of any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

i. That the permittee does not encroach any property rights either in real estate or personal, or any other privilege, and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

j. That this permit does not obviolate the requirement to obtain State or local consent required by law for the activity authorized herein.

k. That this permit may be either modified, suspended or revoked at will or in part pursuant to the policies and procedures of 33 CFR 320.1.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially misleading or incomplete, this permit may be modified, suspended or revoked in whole or in part and/or the Government may, in addition, initiate appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer of this permit the activity authorized herein shall be completed for or extension of the term of such permit as the District Engineer may determine. The permittee shall notify the District Engineer of any extension of more than one week, suspension of work or the completion.

o. That if the activity authorized herein is not completed within the 30 day of May 19 89 time period from the date of issuance of this permit unless otherwise specified in a permit, if not previously extended, it is specifically extended shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the construction or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, subject to the conditions as part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to United States law, he must submit the same to a condition conforming to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall cause such action as may be necessary to record this permit with the Registrar of Titles or other appropriate official charged with the responsibility for maintaining records of title to real interests in real property.



The following Special Conditions will be applicable when appropriate

Consistent with the appropriate circumstances and the best interests of the United States

a. That this permit does not authorize the licensee to engage in any activity or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structure or work authorized herein which may be caused by or result from existing or future operations authorized by the United States in the public interest.

b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters or to obstruct the activity authorized by this permit.

c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be furnished and maintained by and at the expense of the permittee.

d. That the permittee, upon receipt of a notice of revocation of two years or more in expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the structure to its former condition. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may remove the structure to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

e. Structures in the United States that permit the carrying out of the project shall be subject to the same laws and regulations as other structures in the United States. The permittee shall be liable for any damage to the structure or work authorized herein or to the safety of boats caused thereby from any act or omission of the permittee and the permittee shall not hold the United States liable for any such damage.

**Navigation Obstructions**

a. That when the work authorized herein includes periodic operations dredging, it may be performed under the permit from the date of issuance of this permit for every other alternate year.

b. That the permittee will obtain the District Engineer in writing at least two months before he intends to conduct any maintenance dredging.

**Discharge of Pollutants or Other Materials into Marine or Estuarine Waters**

a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 303 of the Clean Water Act and published in 40 CFR 135.

b. That the discharge will consist of certain material free from toxic pollutants at toxic levels.

c. That the fill caused by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution.

**Disposal of Polluted Material into Ocean Waters**

a. That the disposal will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Conservation Act of 1972, published in 40 CFR 155.

b. That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

*Henry E. Schreyer*  
DISTRICT ENGINEER

Feb. 25, 1965  
DATE

BY AUTHORITY OF THE DISTRICT ENGINEER  
*Henry E. Schreyer*  
Henry E. Schreyer, Asst. Chief of Div. 11  
for Major A. W. Schreyer, Colonel  
U.S. Army, District Engineer

MARCH 1, 1965

DATE

Permittee hereby agrees to comply with the terms and conditions of this permit.

DATE

Enclosure  
sec of Div. (4 sheets)



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
WASHINGTON, DC 20315

C 409-70

8 SEP 1984

MEMORANDUM FOR THE DIRECTOR OF CIVIL WORKS

SUBJECT: Territorial Base Permits

This is in response to your memorandum of August 16, 1984, forwarding the two permit cases in the New Orleans District where the District Engineer made the initial determination that the projects might effect the coast line or base line.

Subsequent to that memorandum, the application for the Terrebonne Parish breakwaters in Trinity Bay was withdrawn. I am returning that file so that the District Engineer may take necessary action.

In regard to the Louisiana Department of Transportation and Development (LDOTD) permit for erosion control structures, it appears that the District Engineer has determined that the project will not alter the base line provided a special condition is added to the permit. This is based on his letter of August 7, 1984, paragraph 2(f)(3). If you concur that the base line would not be altered, you may inform the District Engineer that he may proceed to issue the permit.

I understand that LDOTD informally indicated they have no problem with the special condition being added to the permit.

After the District Engineer has taken final action on each of these files, please provide copies of letters to the Departments of Interior and Justice officials with whom these actions were coordinated informing them of the final action in each case, and the basis thereof.

*Robert A. Dawson*  
Robert A. Dawson  
Acting Assistant Secretary of the Army  
(Civil Works)

Enclosures



9. Red Dog, Alaska

- a. Disclaimer      No disclaimer requested
- b. Corps Permit    10/23/85

# STATE OF ALASKA

## OFFICE OF THE GOVERNOR

### OFFICE OF MANAGEMENT AND BUDGET DIVISION OF GOVERNMENTAL COORDINATION

BILL SHEFFIELD, GOVERNOR

#### CENTRAL OFFICE

POUCH AW  
JUNEAU, ALASKA 99811-0165  
PHONE: (907) 465-3562

#### SOUTHEAST REGIONAL OFFICE

431 North Franklin  
Pouch AW, Suite 101  
Juneau, AK 99811-0165  
Phone: (907) 465-3562

#### SOUTHCENTRAL REGIONAL OFFICE

2600 Denali Street  
Suite 700  
Anchorage, AK 99503-2798  
Phone: (907) 274-1581

#### NORTHERN REGIONAL OFFICE

675 Seventh Avenue  
Station H  
Fairbanks, AK 99701-4596  
Phone: (907) 456-3084

Registered Mail  
Return Receipt  
Requested

August 6, 1984

Mr. Harry Noah  
Cominco Alaska  
5660 "B" Street  
Anchorage, AK 99502

Dear Mr. ~~Noah~~: **HARRY**

SUBJECT: RED DOG MINE TITLE 11 PERMIT PACKAGE  
STATE I.D. NUMBER AK840525-20C

The Division of Governmental Coordination (DGC) has completed the review of Red Dog mining project against the standards of the Alaska Coastal Management Program. The project proposal consists of an inland open pit lead/zinc mine, mineral concentrator, a coastal shipping facility, and an interconnecting transportation system.

This conclusive consistency determination applies to the federal consistency requirements for your project and the following State and/or federal authorizations as per 6 AAC 50:

1. U.S. Army Corps of Engineers (COE) permits COE 071-OYD-4-840012 and COE 071-OYD-2-837359.
2. Environmental Protection Agency (EPA) National Pollution Discharge Elimination System (NPDES) permits AK-003865-2 and AK-004064-9.
3. Alaska Department of Environmental Conservation (DEC) Certificates of Reasonable Assurance (401) for the permits named above.

Based on our review, the Division concurs that the proposal is

August 6, 1984

consistent with the Alaska Coastal Management Program provided the following stipulations are added to the NPDES permit AK-004064-9 issued by the EPA:

Page 3 I.B. Effluent Characteristics (outfall 002). Add the following monitoring requirements:

<u>Effluent Characteristics</u>	<u>Effluent Daily Maximum</u>	<u>Limitations 30 day Average</u>	<u>Monitoring Requirements Frequency Sample Types</u>	
Zinc (mg/l)	1.0	.5	Monthly	Grab
Lead (mg/l)	.6	.3	Monthly	Grab
Mercury (mg/l)	0.002	0.001	Monthly	Grab
Cadmium (mg/l)	0.10	0.05	Monthly	Grab

Page 6, II, Add the Following:

E. Monitoring Program Revisions

1. The type and frequency of sampling may be changed depending on the above effluent and field monitoring program results.
2. EPA may require additional monitoring, including biomonitoring if mercury, lead, zinc, cadmium, or oil and grease concentrations exceed effluent limits.

These stipulations are necessary to insure that the parameters included in the water quality monitoring program at the Port Site include sampling for heavy metals as per 6 AAC 80.140 AIR, LAND, AND WATER QUALITY. The text of this standard is provided as an enclosure to this letter.

The National Park Service Right-of-Way permit to construct the transportation system through the Cape Krusenstern National Monument has also been under consideration during this project consistency review of the Title 11 related approvals. The State continues to support the southern corridor through Cape Krusenstern, and finds the COE permit description of the road grade and fill placement through that corridor acceptable at this time. However, we reserve comment on the final recommended terms and conditions applicable to the National Park Service Right-of-Way permit until such time that the State's Department of Natural Resources, NANA-Cominco, and the National Park Service are prepared to jointly develop and implement terms and conditions which will effectively address the concerns and responsibilities of these land management groups. Our postponement of the final consistency review comments on the Right-of-Way is not

Mr. Noah

- 3 -

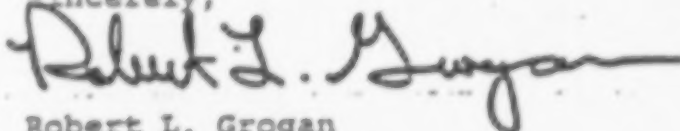
August 6, 1984

intended in any way to hinder progress on the Alaska National Interest Lands Conservation Act, Title 11 permit processing.

By a copy of this letter we are informing the EPA, COE, and the National Park Service of our consistency finding.

Thank you for your cooperation with the Alaska Coastal Management Program.

Sincerely,



Robert L. Grogan  
Associate Director

Enclosure

cc: Esther Wunnicke, Commissioner, DNR, Juneau  
Dick Neve', Commissioner, DEC, Juneau  
Don Collinsworth, Commissioner, DFG, Juneau  
Jerry Brossia, District Manager, DNR, Juneau  
Douglas Lowery, Regional Supervisor, DEC, Juneau  
Al Ott, Regional Supervisor, DFG, Juneau  
/ Fred Wemark, NANA CRSA, Kotzebue  
/ Bill Riley, EPA, Seattle  
Joe Williamson, COE, Anchorage  
Floyd Sharrock, NPS, Anchorage

STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

CERTIFICATE OF REASONABLE ASSURANCE

A Certificate of Reasonable Assurance, as required by Section 401 of the Clean Water Act, has been requested, by Cominco, Incorporated, 5660 "B" Street, Anchorage, Alaska 99502.

The proposed work can be described in two parts:

1. Road connecting the Port Facility and Mine Site: Approximately 3,980,000 cubic yards of fill material will be required to construct a gravel road, including 28 turnouts, in wetlands. The 56.7 mile road will be constructed approximately 6 feet high and 30 feet wide at the crown, with 2:1 side slopes. The dimensions for a typical turnout are 350 feet x 20 feet x 6 feet, with 2:1 side slopes. The road will have a total of 175 culverted crossings and 2 bridge crossings. Gravel material for the road and turnouts will be obtained from several borrow sites. These borrow sites will be permitted at a later date when the exact locations are known.

2. Port Facility: The port will consist of the construction of concentrate transfer facility, dock, upland port facility, and a concentrate storage building. The concentrate transfer facility will consist of ballasting a large ship on the sea floor approximately 4,000 feet offshore. The ship will be ballasted in 35 feet of water and will be used to transfer lead and zinc concentrate from the dock to ocean-going ships. The area dredged for such an action would be 1,000 feet by 150 feet by 5 feet, with the dredged material pumped into the ship's wing tanks to act as ballast (total of 25,000 cubic yards). In addition, 1,000 feet to the north, an area 1,000 feet by 200 feet by 10 feet deep will be dredged to supply ballast for the tanker (total of 75,000 cubic yards). There would be no onshore storage of dredged material. The dock will be 400 feet long and extend to 12 foot water depth offshore with 3:1 side slopes. Twenty-nine thousand (29,000) cubic yards of fill would be needed for the dock, including armor rock located at the toe of the structure. The upland port site will be constructed in wetlands adjacent to the Chukchi Sea and will be used as a staging area for concentrate shipping, the movement of mine supplies, and building materials. The pad will be 510 feet by 265 feet and 10 feet deep. The total fill required is 63,000 cubic yards. The concentrate storage building will be located on the excavated borrow site approximately 2.5 miles from the shore side facility. The building will be 912 feet by 180 feet by 80 feet tall. No fill will be required. The opening of the port lagoon would require the dredging of an opening which would be 60 feet by 370 feet by 12 feet. A total of 15,000 cubic yards of material would be moved. This would be done to allow access to the lagoon for the construction barge to be used in the initial development of the road and port.

The purpose is to develop a road and port facility for the construction and operation of the Red Dog Mine. The road will be an industrial use road constructed to carry 150 ton trucks which will move lead/zinc concentrate from the mine. The road would carry up to 12 truck trips per day plus other assorted mine-related vehicle trips. The port would function approximately 4 months of the year and would act as the incoming and outgoing point for all material for the Red Dog Mine.

September 5, 1984

The proposed port facility is located at the Chukchi Sea near Kivalina, Alaska in Section 10, T.25N., R.24W., Kateel River Meridian. The mine site is located in Section 19, T.31N., R.18W., Kateel River Meridian.

Public Notice of the application for this certification has been made in accordance with 18 AAC 15.180.

Water Quality Certification is required for the proposed activity because the activity will be authorized by a Department of the Army permit identified as Chukchi Sea 9, NPACO 071-OYD-2-630359 and a discharge may result from the proposed activity.

Having reviewed the application and comments received in response to the public notice, the Alaska Department of Environmental Conservation certifies that there is reasonable assurance that the proposed activity, as well as any discharge which may result, is in compliance with the requirements of Section 401 of the Clean Water Act which includes the Alaska Water Quality Standards, 18 AAC 70, and the Standards of the Alaska Coastal Management Program, 6 AAC 80. In accordance with our standard stipulations for similar projects, we recommend that:

1. Adequate culverts are installed and maintained along the access road to assure natural drainage patterns.
2. The concentrate transfer facility and the barge dock are designed to remain stable under anticipated scour, wind and ice forces to minimize the likelihood of fuel and concentrate spills into the Chukchi Sea during transfer and/or storage.

September 5, 1984  
Date:

Douglas L. Lowery  
Douglas L. Lowery  
Regional Environmental Supervisor



Application No. 071-QYD-2-Sub 359

Name of Applicant Cominco Alaska, Incorporated

Effective Date OCT. 23 1985

Expiration Date (if applicable)

File No. Chukchi Sea 9

DEPARTMENT OF THE ARMY  
PERMIT

UN 2-0-1869  
Div. of Land & Water Mgt.  
Cadastral Survey

Referring to written request dated August 1, 1983

for a permit to:

- (X) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);
- (X) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344);
- ( ) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (16 Stat. 1062; P.L. 92-622);

Cominco Alaska, Incorporated  
5660 B Street  
Anchorage, Alaska 99502

is hereby authorized by the Secretary of the Army:

a. place approximately 3,980,000 cubic yards (cy) of fill into wetlands to construct a 56.7 mile road with a 30' crown width and twenty-eight 350'x20' turnouts, the fill depth would average approximately 6' deep and have 2:1 side slopes

b. to ground an approximately 155'x1,017' vessel approximately 4,000' seaward of mean high water for part of an ore-transfer facility (continued on 1a)

is below the high tide line of and in wetlands adjacent to the Chukchi Sea

at Kivalina, Alaska

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (see drawings, give file number or other definite identification marks.)

"PROPOSED: ROAD AND PORT FACILITY FILL; IN: CHUKCHI SEA; AT: KIVALINA, ALASKA; APPLICATION BY: COMINCO ALASKA, INCORPORATED; DATE: JANUARY 1984; 13 SHEETS. ALSO SUBJECT TO ADEC SPECIAL CONDITIONS."

subject to the following conditions:

I. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k herein, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

ENG FORM 1721, Sep 82

EDITION OF 1 JUL 77 IS OBSOLETE

7. That when the activity authorized herein involves a discharge during its construction or operation, or any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

a. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

g. That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

l. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

k. That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

c. That if the activity authorized herein is not completed on or before 31st day of September 1990, (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition t hereof, he must restore the area to a condition satisfactory to the District Engineer.

11/15/51 4:50 PM

a. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

u. That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

II. Special Conditions: (Here list conditions relating specifically to the proposed structure or work authorized by this permit):

a. That there shall be no stockpiling nor doublehandling of materials on wetlands adjacent to the project site, without prior approval of the District Engineer.

b. That drainage structures shall be installed and maintained that are adequate to prevent impoundment of water or erosion and drainage of adjacent aquatic areas. These structures will be provided at the time of road construction. If surface drainage is not maintained, additional drainage structures or modifications to existing structures shall be accomplished prior to the following spring breakup.

c. Except for stream crossings, a minimum distance of 100 feet shall be maintained between the toe of the road and the ordinary high water mark of any adjacent lake, river, or stream.

d. That dikes for fuel storage areas shall be designed to hold 110% of the largest independent container within the dike or, if manifolded tanks are used, the total volume plus 10% of the largest set of manifolded tanks. Dikes for permanent fuel storage areas shall be rendered impermeable.

e.(1) To the maximum extent possible the road alignment shall be located at least two miles from any peregrine falcon nest. However, if the road alignment is located within two miles of any peregrine falcon nest site the permittee shall contact the District Engineer for approval prior to construction of that segment of road. Road construction within two miles of any active nest site shall be prohibited from April 15 through August 31.

(2) That within two miles of active peregrine falcon nest sites all activities having high noise levels, e.g. ballasting, operation of heavy construction equipment, etc., shall be prohibited from April 15 through August 31.

(3) That within one mile of active peregrine falcon nest sites aircraft will be required to maintain a minimum altitude of 1,500 feet above nest sites from April 15 through August 31; all ground level activities shall be prohibited from April 15 through August 31; and habitat alterations or the construction of permanent facilities will be prohibited.  
(continued on 3a)



The following Special Conditions will be applicable when appropriate:

**STRUCTURES IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES:**

a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit: *CL DELIVERED 10/11/85 1111 PM CLOVIS 1985*

c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee. *CL DELIVERED 10/11/85 1111 PM CLOVIS 1985*

d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

e. Structures for Small Boats: That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

**MAINTENANCE DREDGING:**

a. That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for \_\_\_\_\_ years from the date of issuance of this permit (*ten years unless otherwise indicated*);

b. That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

**DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES:**

a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR 230;

b. That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.

c. That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution.

**DISPOSAL OF DREDGED MATERIAL INTO OCEAN WATERS:**

a. That the disposal will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220-228.

b. That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

*Robert K. Oja* - President *Jan 25/85*  
PERMITTEE TITLE DATE

**BY AUTHORITY OF THE SECRETARY OF THE ARMY:**

*Don M. Fohler* *10/23/85*  
Robert K. Oja, Chief, Regulatory Branch DATE

FOR: DISTRICT ENGINEER, Colonel Wilbur T. Gregory, Jr.

U.S. ARMY, CORPS OF ENGINEERS

Transferee hereby agrees to comply with the terms and conditions of this permit.

DATE: \_\_\_\_\_

c. to dredge approximately 25,000 cy of seabed material from a 1,000'x150' area with an approximate depth of 5' and approximately 75,000 cy of seabed material from a 1,000'x200' with an approximate depth of 10' and to pump the material into the vessel to be grounded

d. to place approximately 29,000 cy of fill below the high tide line to a depth of 16' for the purpose of constructing a 400' dock with a maximum width of 200'

e. to place approximately 63,000 cy of fill into wetlands for the purpose of constructing a 510'x256'x10' deep staging pad

f. to dredge approximately 15,000 cy of seabed material from an 370'x60' area with an approximate depth of 12' and to deposit the material into two approximately 60'x60' areas adjacent to the dredged area for the purpose of creating an opening to the port lagoon

(4) From April 15 through June 1 of each year all peregrine falcon nests will be considered active nest sites. Nest sites determined not to be occupied after June 1 will be considered inactive and the timing restrictions described in the above paragraphs shall not apply for the remainder of that year.

f.(1) Vessels and aircraft shall avoid concentrations of groups of whales. Operators shall, at all times, conduct their activities at a maximum distance from such concentrations of whales. Under no circumstances, other than an emergency involving immediate danger or destruction of life or property, will aircraft be operated at an altitude lower than 1,000 feet when within 500 lateral yards of groups of whales. Helicopters shall not hover or circle above such areas or within 500 lateral yards of such areas.

(2) When weather conditions do not allow a 1,000 foot flying altitude, such as during severe storms or when cloud cover is low, aircraft will be operated below the 1,000 foot altitude as stipulated above. However, when aircraft are operated at altitudes below 1,000 feet because of weather conditions, the operator will avoid known whale concentration areas and will take precautions to avoid flying directly over or within 500 yards of groups of whales.

g. When a vessel is operated near a concentrations of whales the operator shall take every precaution to avoid harassment of these animals. Vessels shall reduce speed when within 300 yards of whales and those vessels capable of steering around such groups will do so. Vessels will not be operated in such a way as to separate members of a group of whales from other members of the group.

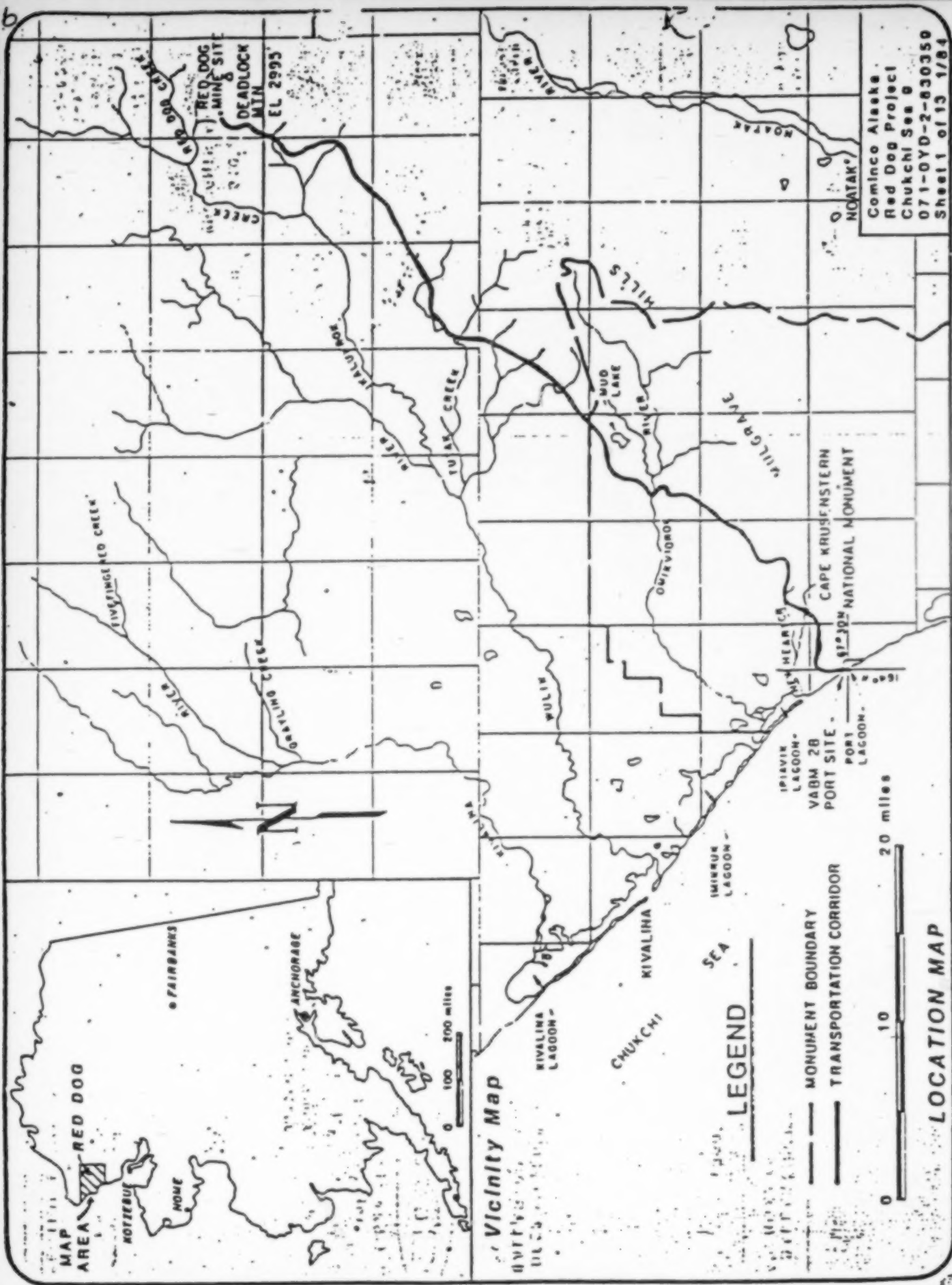
h. Vessel operators shall avoid multiple changes in direction and speed when within 300 yards of whales. In addition, operators will check the waters immediately adjacent to a vessels to ensure that no whales would be injured when the vessel's propellers [or screws] are engaged.

i. Small boats shall not be operated at such a speed as to make collisions with whales likely. When weather conditions require, such as when visibility drops, vessels will adjust speed accordingly to avoid the likelihood of injury to whales.

j. That the permittee shall establish, in consultation with the Alaska Department of Fish and Game, a caribou monitoring program which will be designed to determine the extent and alteration of traditional movement patterns due to road activities. The monitoring program shall be submitted to the District Engineer for approval within three months of the issuance of the permit.

k. That the permittee shall establish, in consultation with Environmental Protection Agency and the Alaska Department of Environmental Conservation, a water quality monitoring program to determine any cumulative effects of small spills on the marine environment. The monitoring program shall be submitted to the District Engineer for approval within three months of the issuance of the permit.





Cominco Alaska.  
Red Dog Project  
Chukchi Sea  
071-0YD-2-830350  
Sheet 1 of 13 1/84



975

CHUKCHI BEA

PORT SITE

Gravel Pit

Exploration area

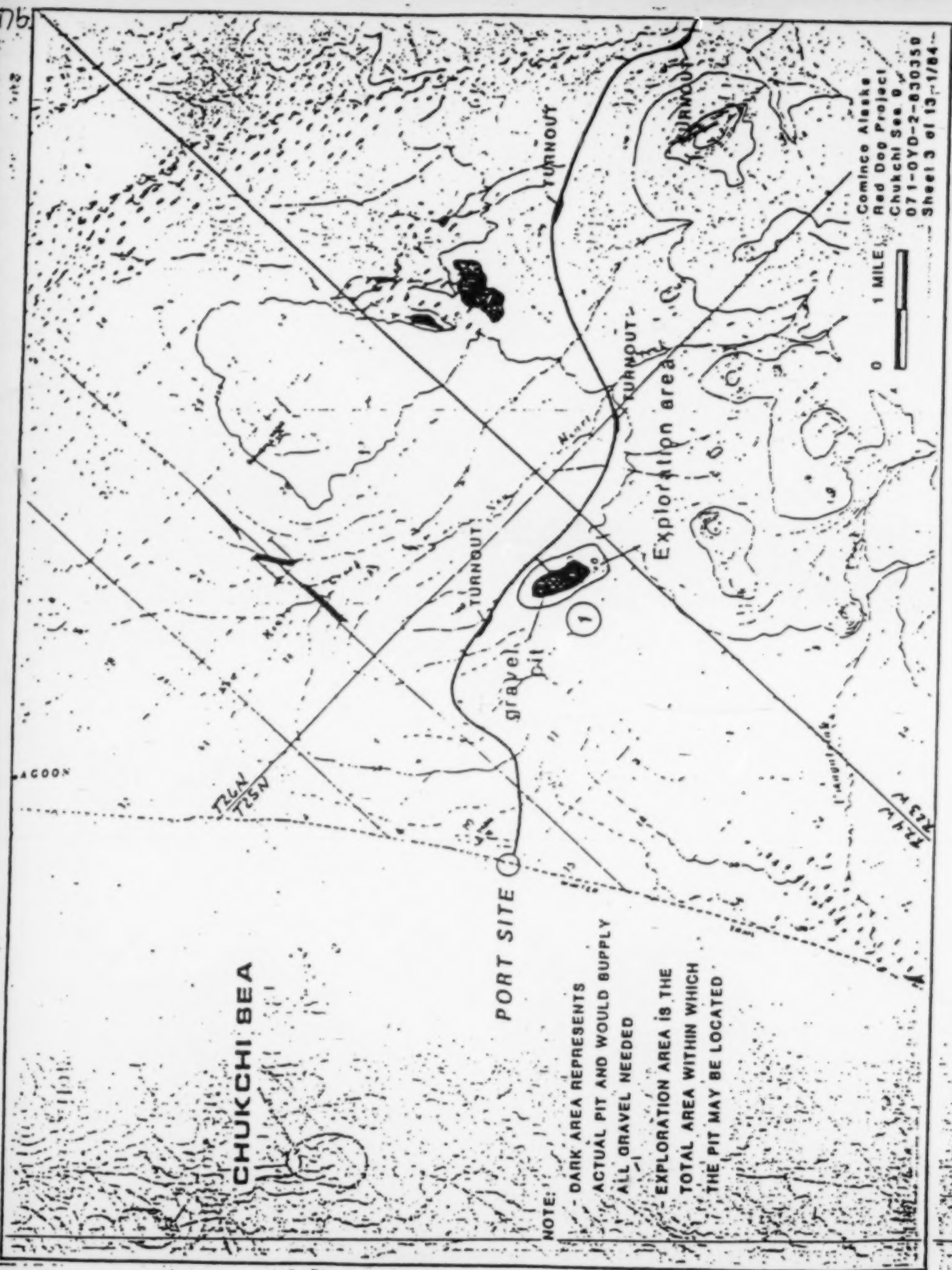
NOTE:

- DARK AREA REPRESENTS  
ACTUAL PIT AND WOULD SUPPLY  
ALL GRAVEL NEEDED
- - - EXPLORATION AREA IS THE  
TOTAL AREA WITHIN WHICH  
THE PIT MAY BE LOCATED

0 1 MILE

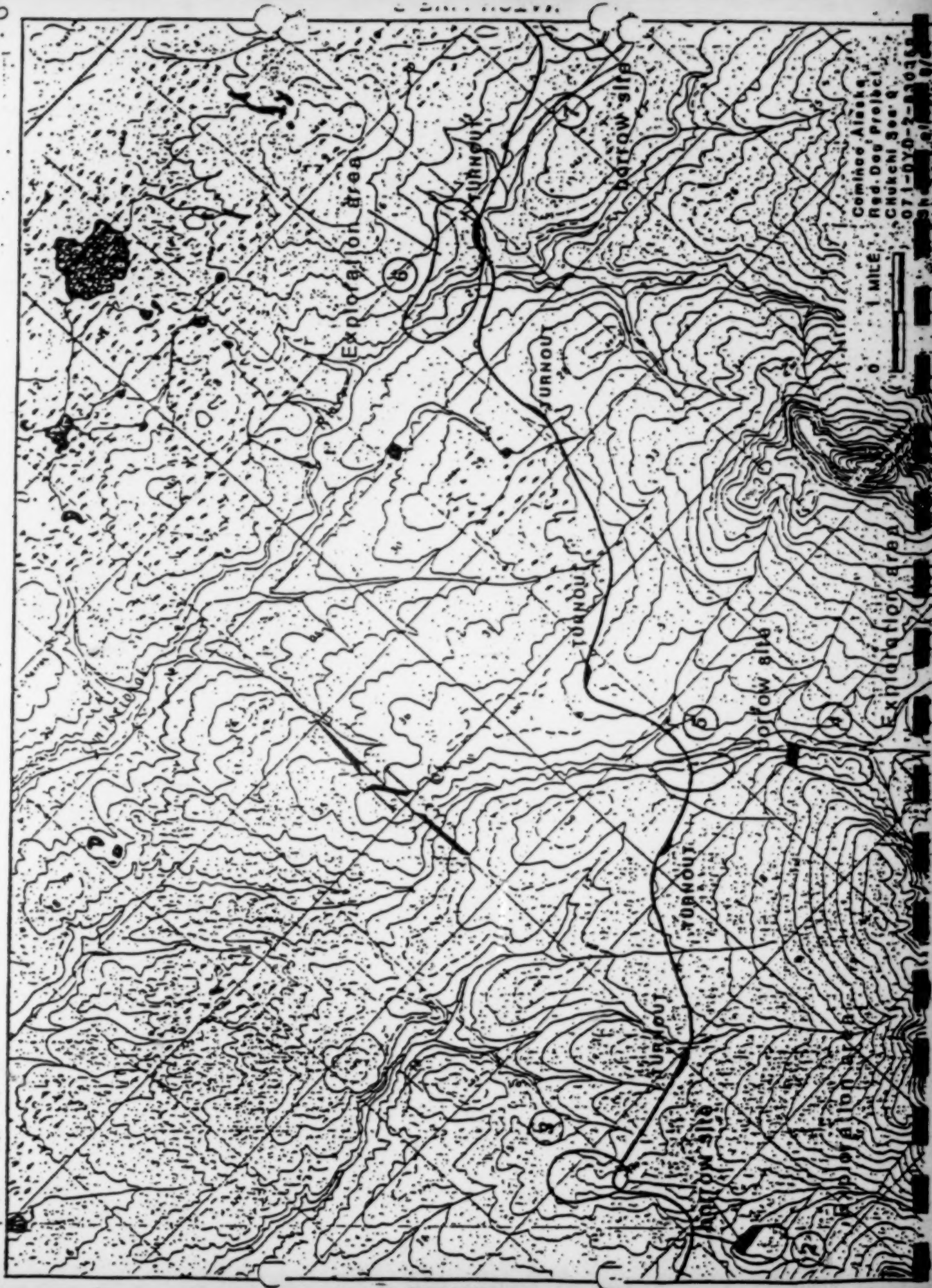


Cominco Alaska  
Red Dog Project  
Chukchi Sea  
071-OYD-2-830350  
Sheet 3 of 13 1/84



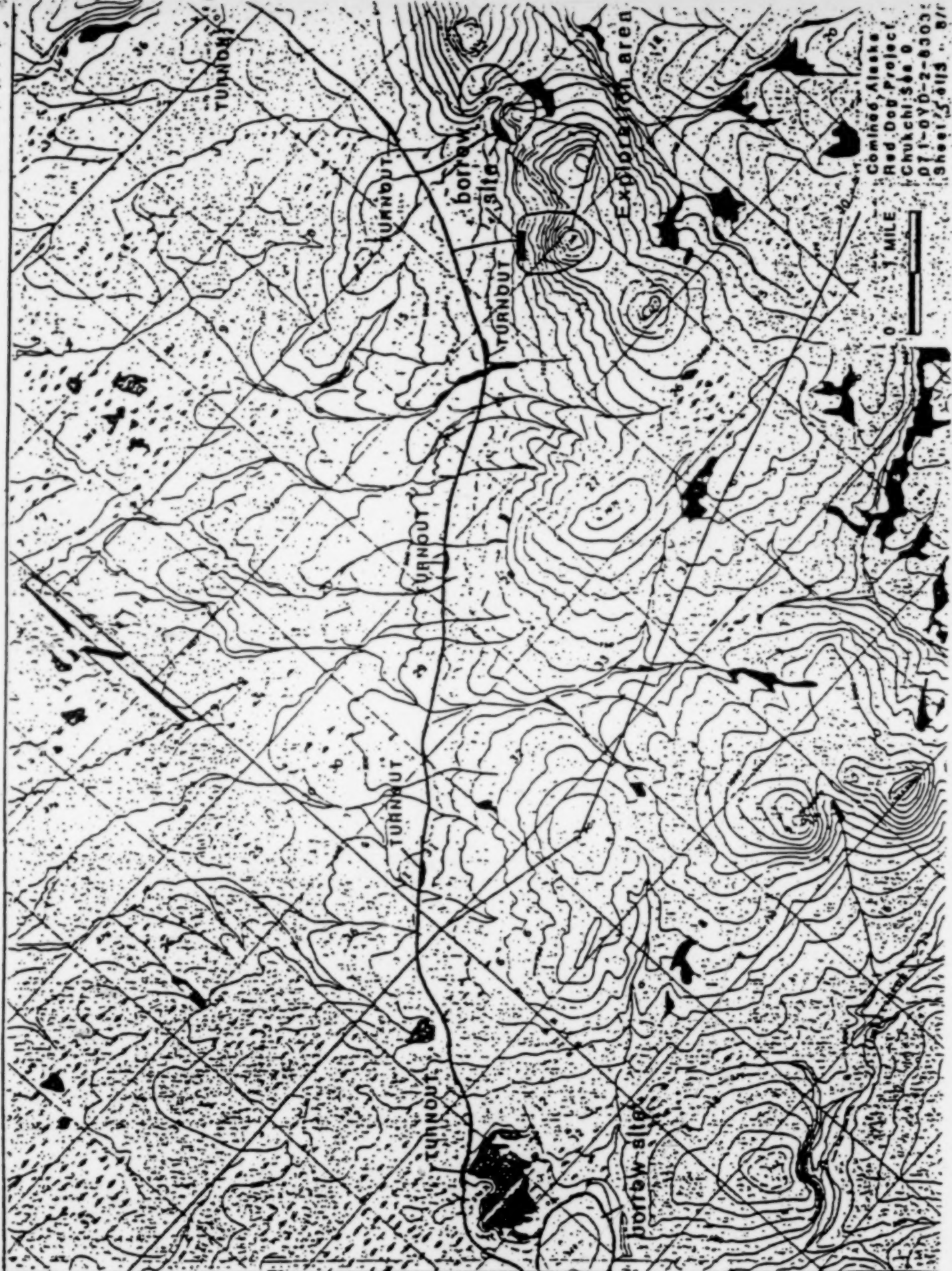


51(97b



MATCH LINE A

Combined Alaska  
Red. Dev. Project  
CHUKCHI Sea  
071-050-2-220366

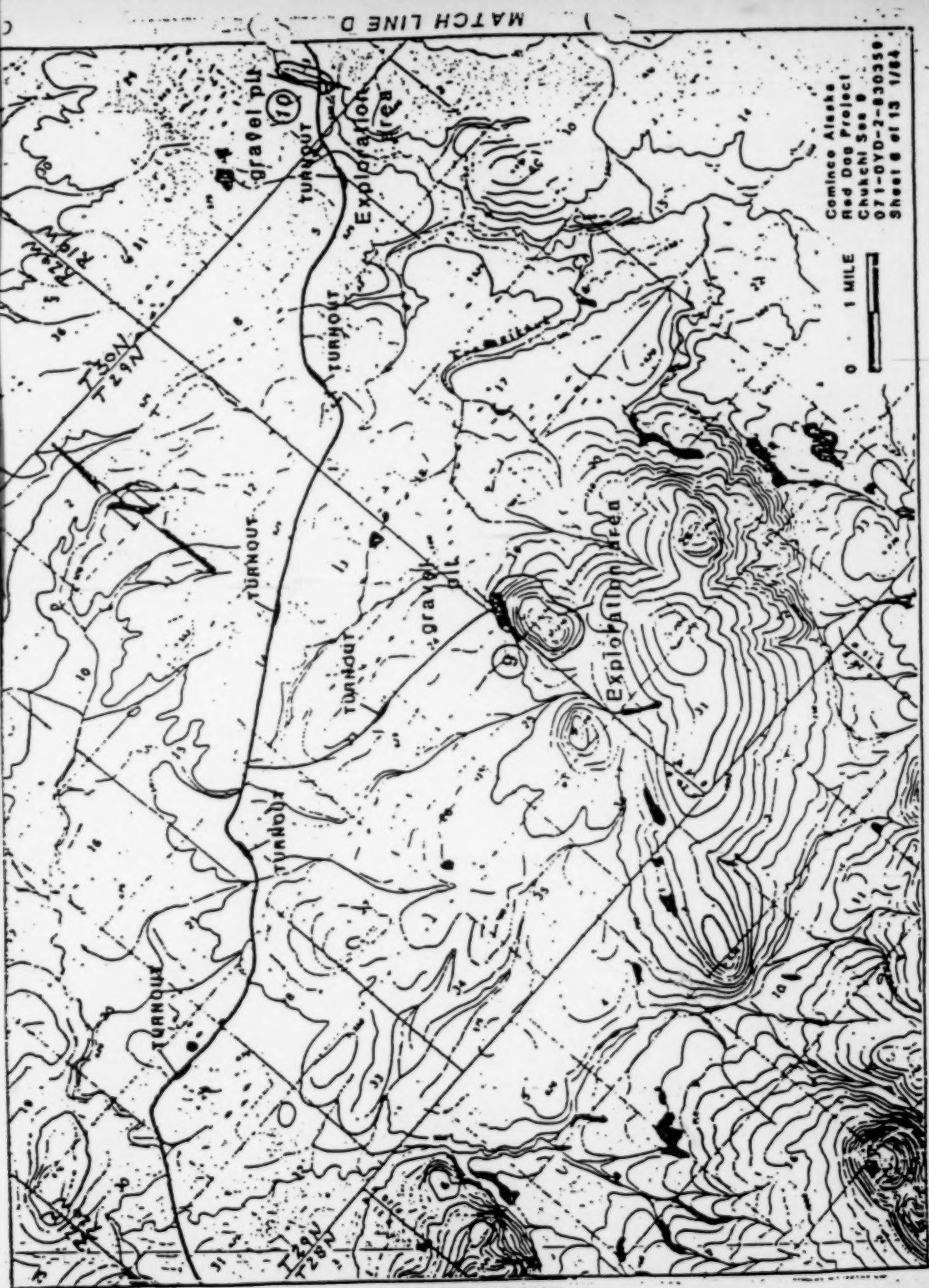


MATCH LINE B

0 1 MILE

Combined Alaska  
Red Dog Project  
Chukchi Sea  
DTI-OVD-2-8303  
Sheet 5 of 8





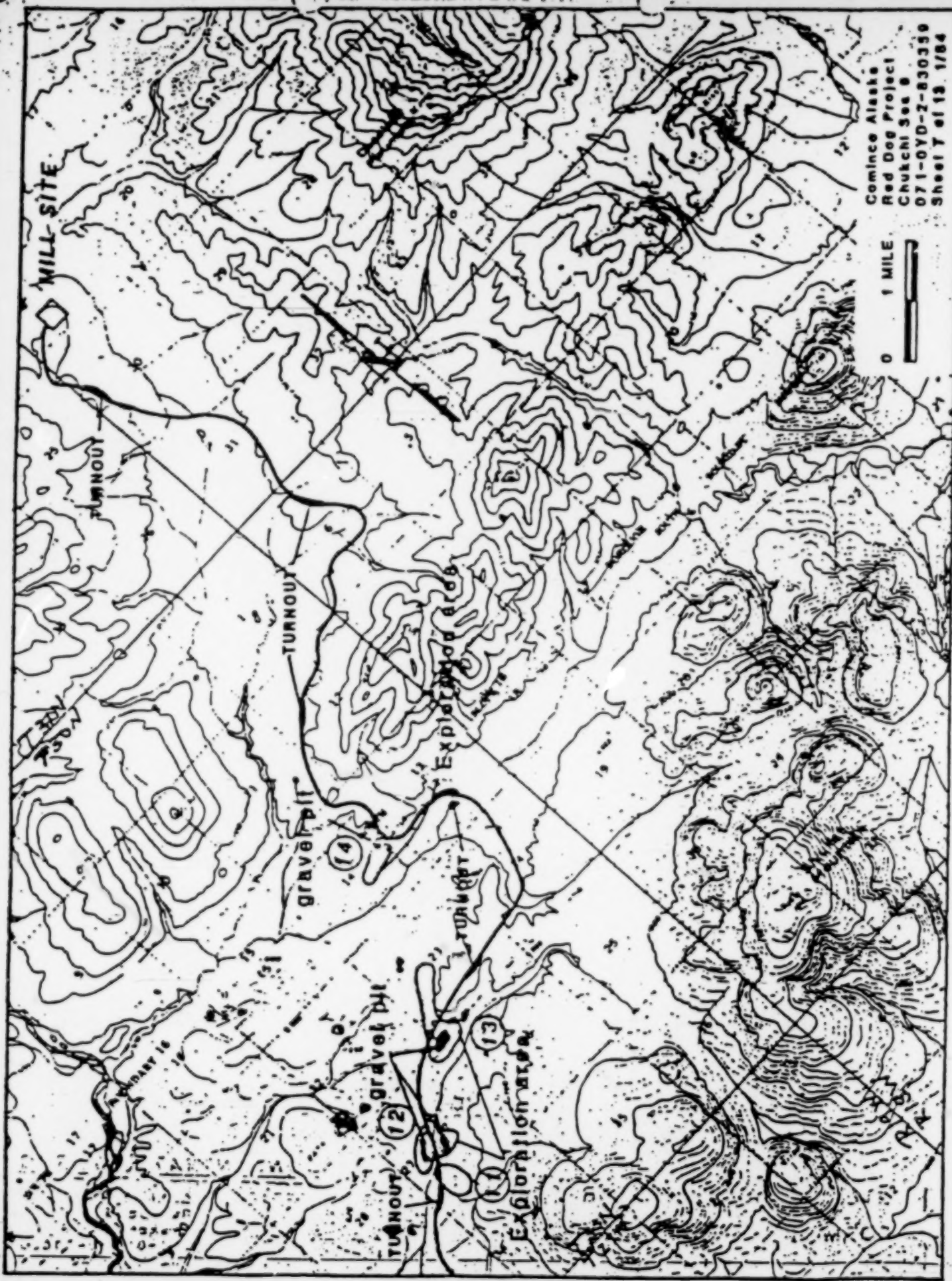
Cominco Alaska  
Red Dog Project  
Chukchi Sea 0  
071-0YD-2-830359  
Sheet 8 of 13 1/84

0 1 MILE

MATCH LINE C

MATCH LINE D





Cominco Alaska  
Red Dog Project  
Chukchi Sea 8  
071-0YD-2-830359  
Sheet 7 of 13 1/84

0 1 MILE

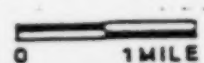
MATCH LINE D

# CONCENTRATE STORAGE BUILDING FACILITIES LOCATION

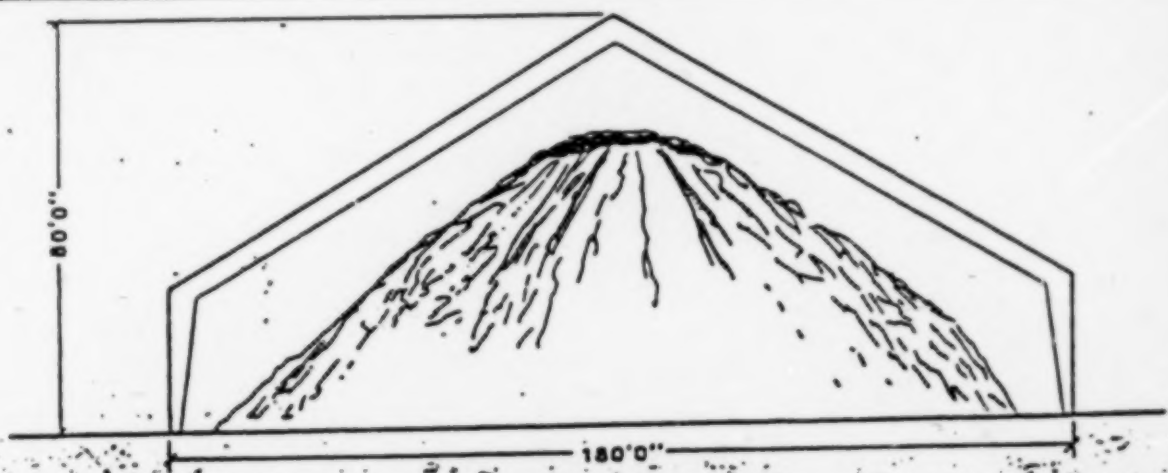
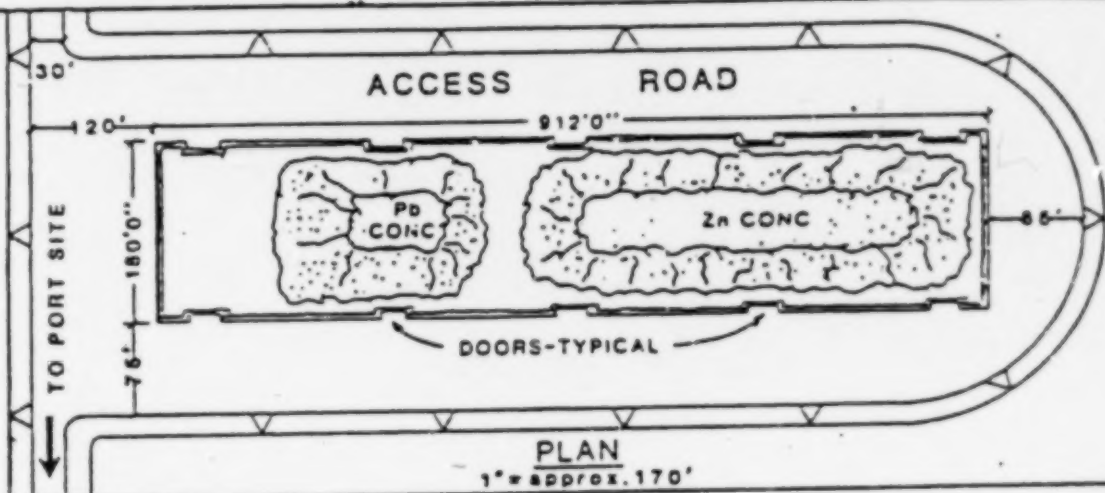
AT MILE 2.6

①

PORT SITE



LOCATION DETAIL



SECTION ELEVATION

1" = 35'

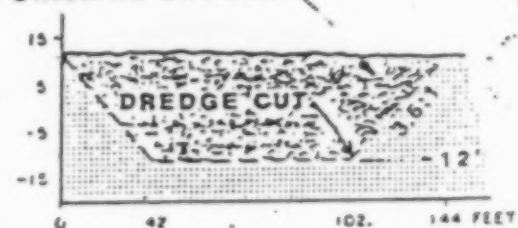
FACILITY BUILT ON BEDROCK OF  
FORMER BARROW SITE AT PT. ①

CONCENTRATE STORAGE

Cominco Alaska  
Red-Dog Project  
Chukchi Sea  
071-0YD-2-830358  
Sheet 8 of 13 1/84

**PORT SITE**  
( See sheet 2 for detail )

ORIGINAL GROUND



**SECTION ELEVATION (B)**

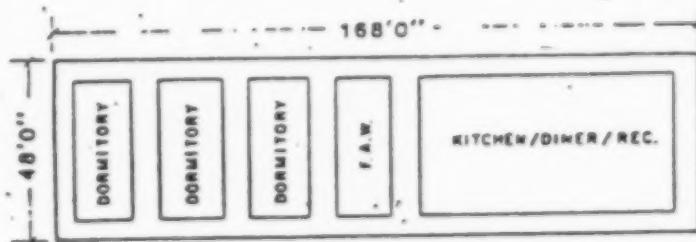
hor. 1" = 68' ver. 1" = 40'

ORIGINAL GROUND



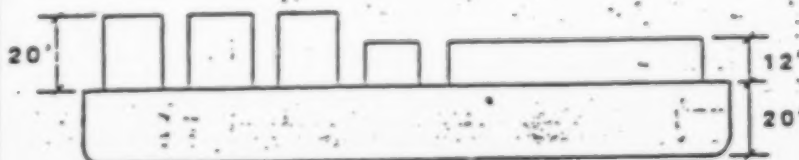
**SECTION ELEVATION (A)**

hor. 1" = 225' ver. 1" = 40'



**BARGE LAYOUT**

1" = 50'



**ELEVATION**

1" = 50'

BARGE

**PORT LAGOON**

**LAYOUT**

1" = 300' ( approx. )

**NATURAL BREACH**

DREDGE SPOILS  
15,000 CU. YDS.

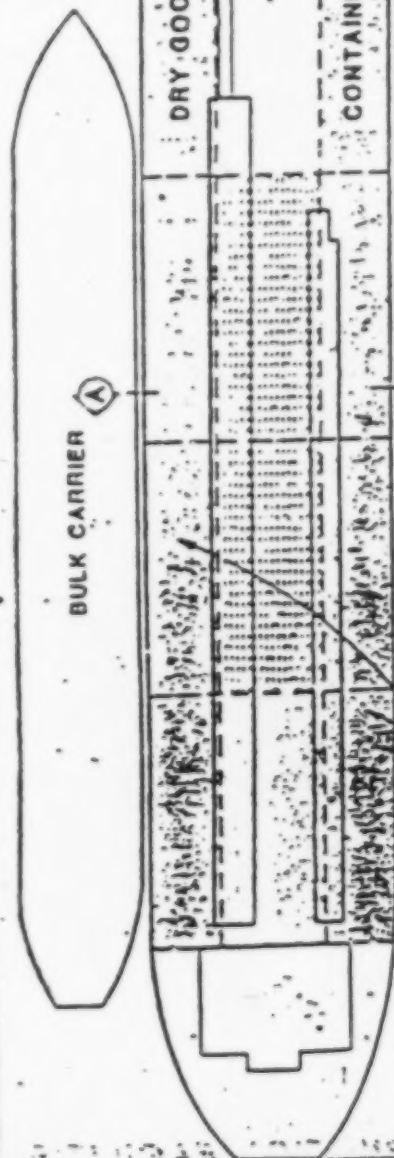
DREDGED CHANNEL

**NOTE:**

**CONSTRUCTION FACILITIES**

Cominco Alaska  
Red Dog Project  
Chukchi Sea 9  
071-0YD-2-8303  
Sheet 9 of 13 1/84





BALLAST  
100,000 CU. YDS.

2017.

PLAN

**DELIVERY BARGE**

AVAILABLE STORAGE DEPTH-42'

SECTION ELEVATION ©

 $\gamma'' = 120^\circ$ 

DREDGED PAD TO PRODUCE  
25,000 CU. YDS. MATERIAL  
TO BE USED AS BALLAST  
(vertical exaggerated)

SEARCHED

## BALLAST

**BULK  
CARRIER**

11

**TRUCK CARRIER**

154'9"

SECTION ELEVATION (A)

 $1'' = 120'$ 

(vertical exaggerated)

**SECTION ELEVATION ⑧**

 $\gamma'' = 120^\circ$ 

DEEP WATER DOCK

Cominco Alaska

Red Don Project

Chukchi Sea

071-0YD-2-830350

Sheet 10 of 13 1/84

ORIGINAL GROUND

SLOPE VARIABLE. VOLUME  
DEPENDENT ON MATERIAL

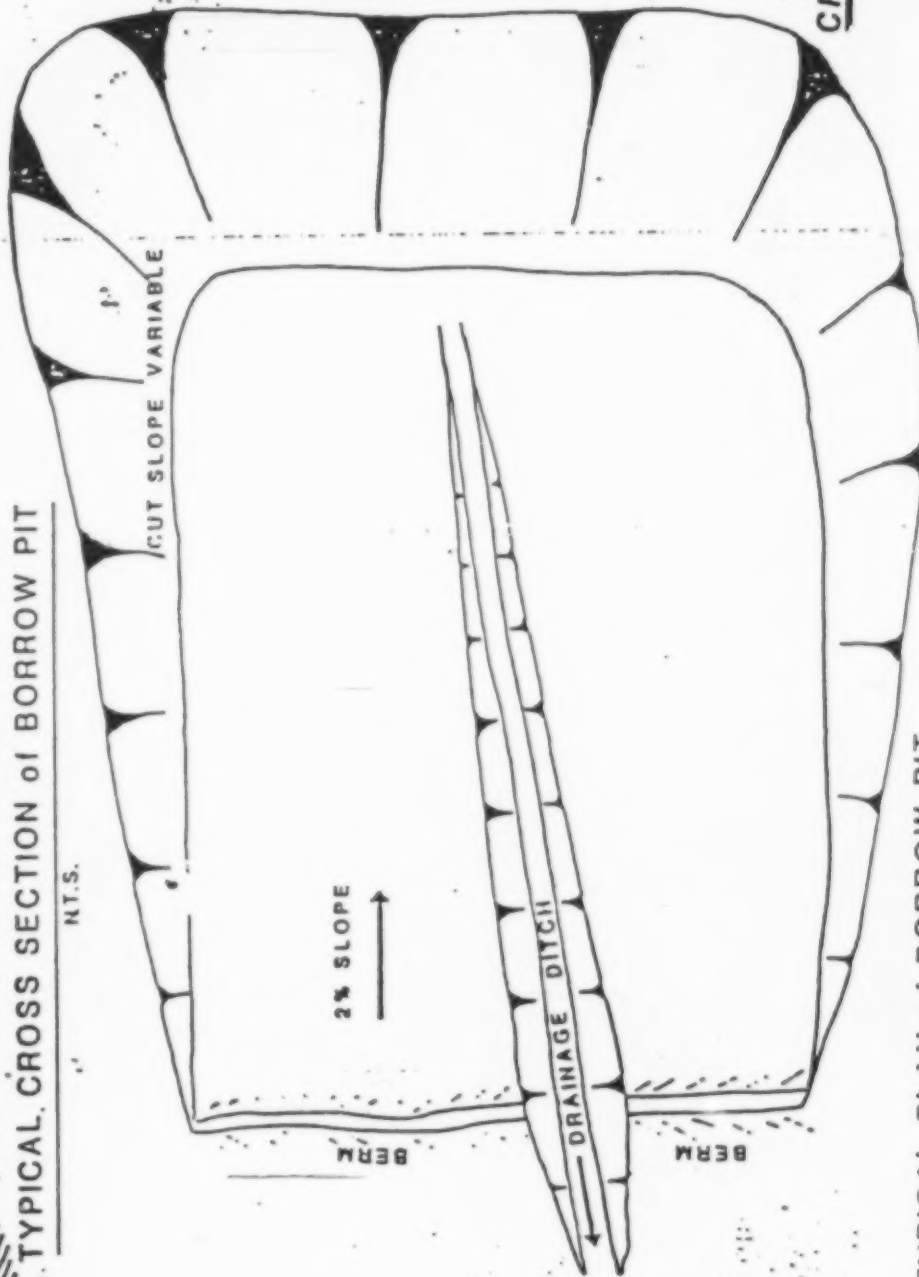
BERM

2% →

← 2% DRAINAGE DITCH

TYPICAL CROSS SECTION of BORROW PIT

N.T.S.



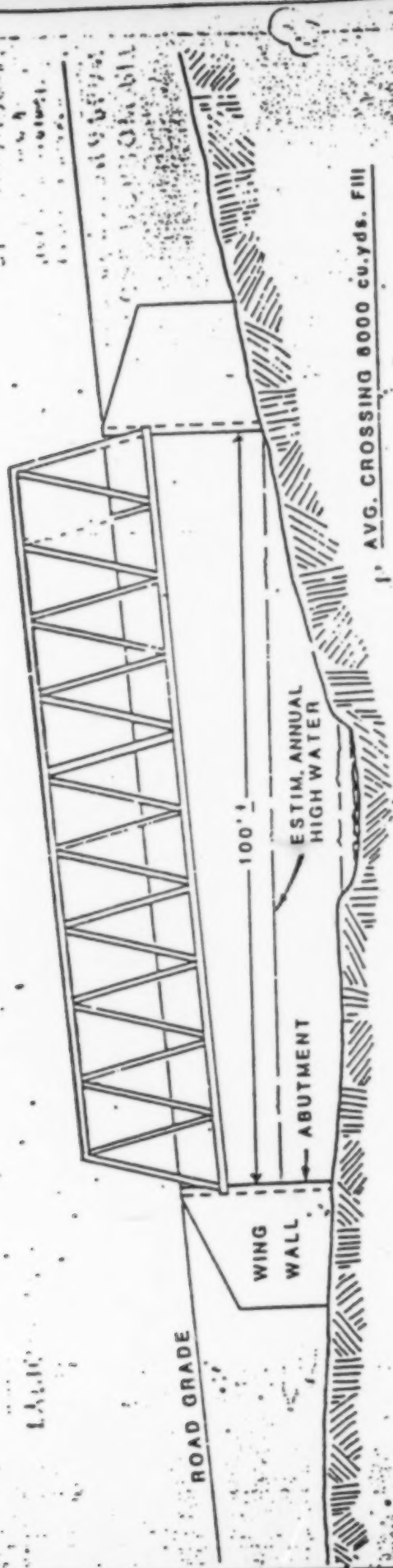
NOTE: VOLUME OF OVERBURDEN  
NOT AVAILABLE  
NO OVERBURDEN STOCKPILE  
SHOWN AT THIS TIME

TYPICAL BORROW P  
CROSS SECTION & PLA

Cominco Alaska  
Red Dog Project  
Chukchi Sea  
071-0YD-2-B303  
Sheet 11 of 13

TYPICAL PLAN of BORROW PIT

N.T.S.



**TYPICAL BRIDGE CROSS SECTION**

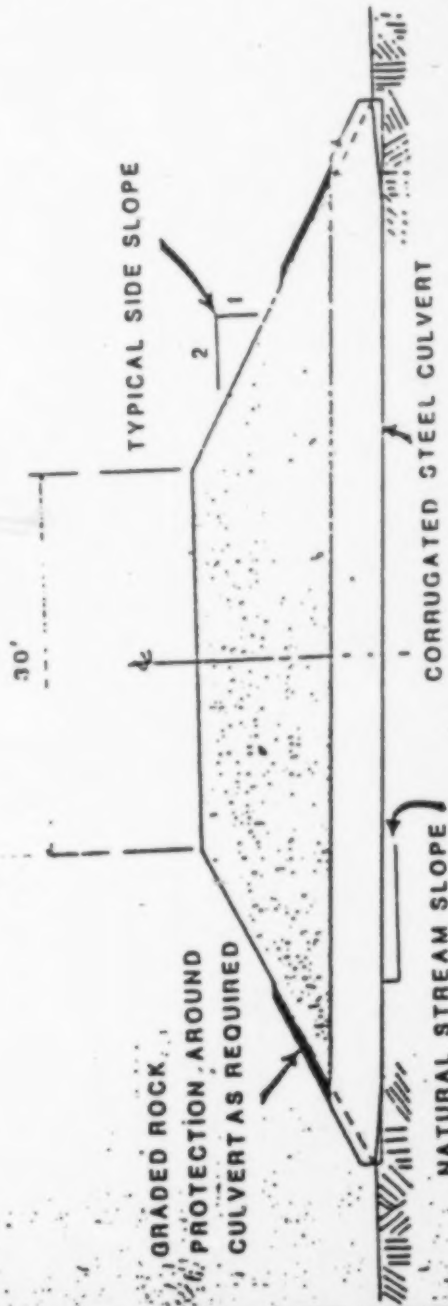
SCALE: HOR. 1"=20' VERT. 1"=10'

**EXPLANATION of ROAD**

- 56.7 MILES LONG, 30' NOMINAL WIDTH  
W/ GRAVELED SURFACE & AVG.  
6" SUBBASE of GRANULAR FILL
- TOTAL FILL : 3,886,000 cu. yds.
- TOTAL CULVERTS : 176
- TOTAL TURNOUTS : 28  
- 4000 cu. yds. FILL  
- DIM. 50' WIDE X 350' LONG  
PER TURNOUT
- MAJOR BRIDGES : ONE
- CROSSING of RIVERS & STREAMS :  
- OMIKVOROK RIVER

**BRIDGE & ROAD  
CROSS SECTIONS**

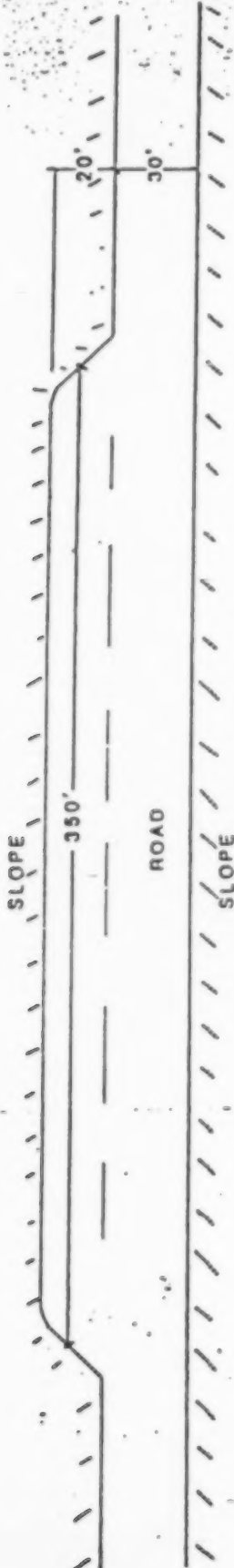
Gomino Alaska  
Red Dog Project  
Chukchi Sea  
0711-0YD-2-830351  
Sheet 12 of 13



**TYPICAL ROAD CROSS SECTION SHOWING TYPICAL CULVERT**

15' AVG. 1500 cu. yds. of fill

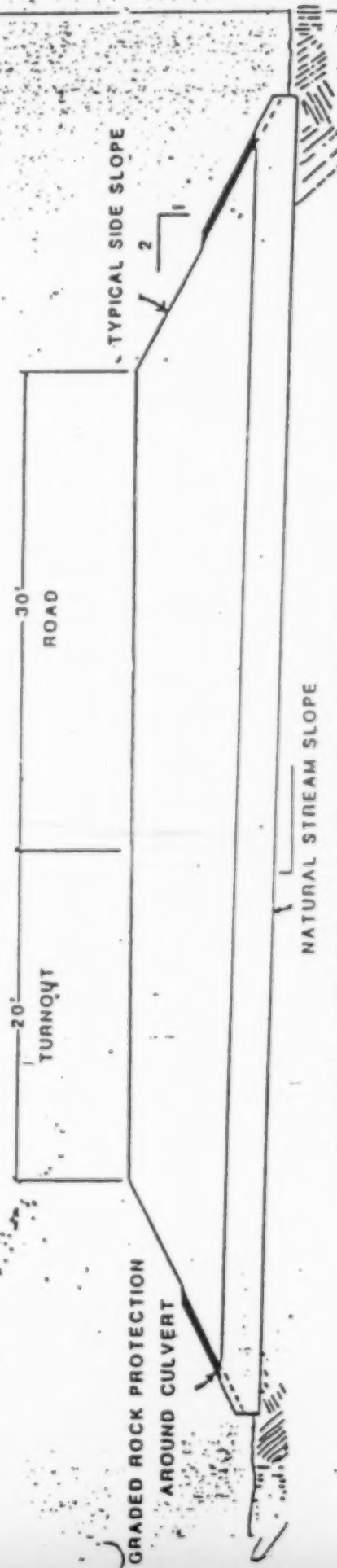




TYPICAL PLAN OF TURNOUT  
SCALE 1" = 60'

NOTE:

REFER TO SHEET 2 OF 13



TYPICAL CROSS SECTION OF TURNOUT

N.T.S.

Cominco Alaska  
Red Dog Project  
Chukchi Sea  
071-0YD-2-83033  
Sheet 13 of 13

TYPICAL TURNOUT  
CROSS SECTION & PLAN

10. Cape Nome, Alaska

- a. Disclaimer      No disclaimer requested
- b. Corps Permit    05/21/86

Application No. 171-YU-2-00422Name of Applicant City of NomeEffective Date MAY 31 1986

Expiration Date (If applicable) \_\_\_\_\_

File No. Norton Sound 45

# DEPARTMENT OF THE ARMY PERMIT

Referring to written request dated August 5, 1985 for a permit to:

( ) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);

( ) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344);

( ) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052; P.L. 92-532);

City of Nome  
Post Office Box 211  
Nome, Alaska 99762

is hereby authorized by the Secretary of the Army:

to dredge approximately 9,200 cubic yards (cy) of material and place approximately 440,000 cy of dredged and fill material to construct a rock loading jetty and realign a portion of the Nome-Council Road. The 9,200 cy would be dredged to provide stability at the toe of the slope and redeposited within the jetty. A total of 40,000 cy of small rock, sand and gravel and 50,000 cy of A-1 and B-1 armor rock will be used to construct the 300'x100' jetty with 2:1 side slopes. Another 300,000 cy of quarry spalls and armor rock will be placed to realign approximately 8,500' of the roadway having a crown width of 30'

in Norton Sound

at Cape Nome, section 23, T. 12 S., R. 32 W., N.W. 1/4

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings, give file number or other definite identification marks.)

"PROPOSED: CAPE NOME ROCK LOADING JETTY AND ROAD REALIGNMENT; IN: NORTON SOUND; AT: CAPE NOME, ALASKA; APPLICATION BY: CITY OF NOME; 4 SHEETS; DATED: AUGUST 1985."

subject to the following conditions:

## 1. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act (33 U.S.C. 1344), the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92-532, 86 Stat. 1052), or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation, or any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permittee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations.

j. That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

k. That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not completed on or before \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_, (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition t hereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

u. That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archaeological or other cultural resource within the area subject to Department of the Army jurisdiction that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

ii. Special Conditions: *(Here list conditions relating specifically to the proposed structure or work authorized by this permit):*



D. N. A.

The following Special Conditions will be applicable when appropriate:

**STRUCTURES IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES:**

- a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.
- b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.
- c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
- d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.
- e. Structures for Small Boats: That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

**MAINTENANCE DREDGING:**

- a. That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for \_\_\_\_\_ years from the date of issuance of this permit (*ten years unless otherwise indicated*);
- b. That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

**DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES:**

- a. That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR 230;
- b. That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.
- c. That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution.

**DISPOSAL OF DREDGED MATERIAL INTO OCEAN WATERS:**

- a. That the disposal will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220-228.
- b. That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

Myrtle Beach City Manager 5/17/86  
PERMITTEE TITLE DATE

**BY AUTHORITY OF THE SECRETARY OF THE ARMY:**

Don M. Kohler 5/21/86  
Don M. Kohler, Chief, Permit Processing Section  
Regulatory Branch DATE

FOR: DISTRICT ENGINEER,

U.S. ARMY, CORPS OF ENGINEERS Colonel Wilbur T. Gregory, Jr.

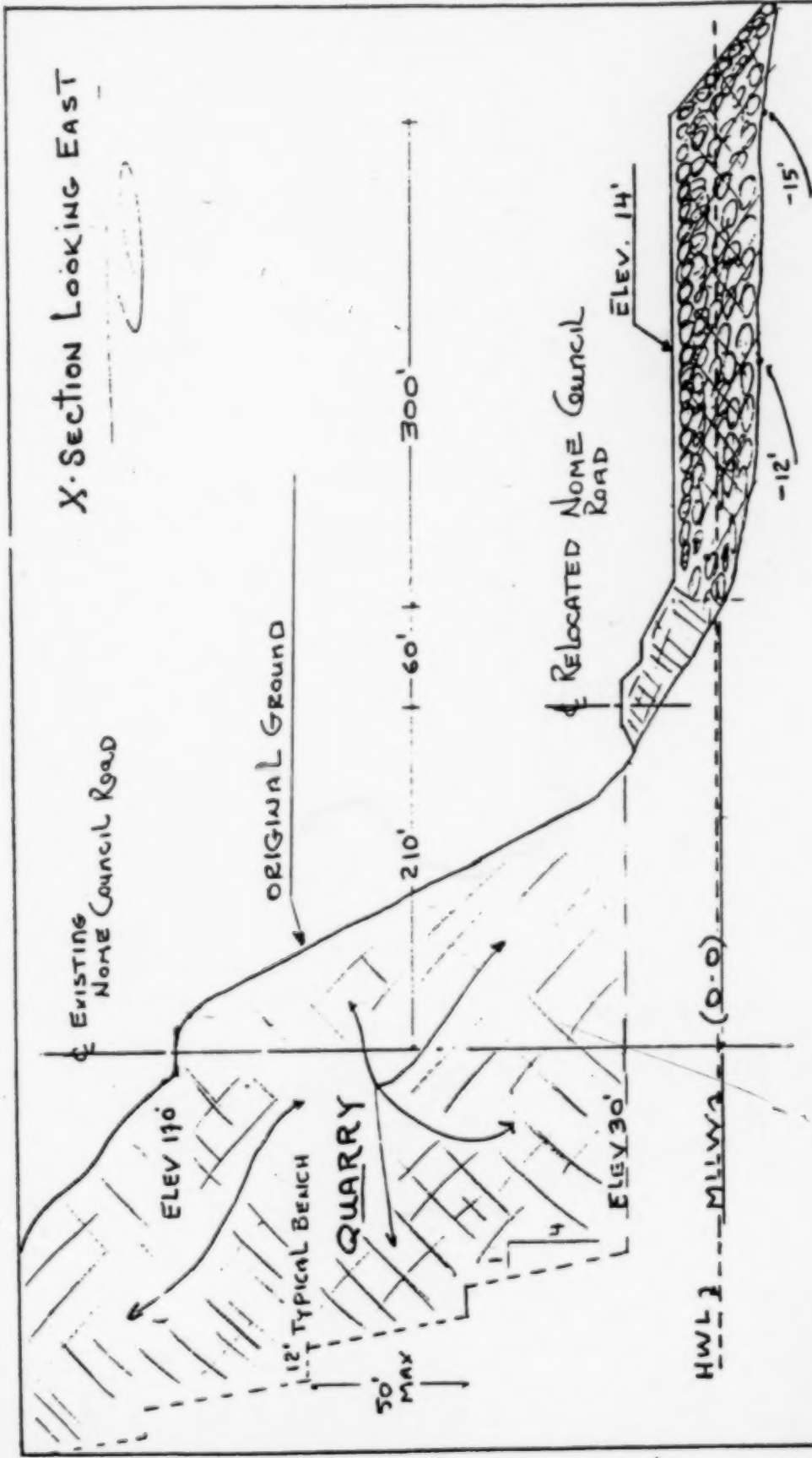
Transferee hereby agrees to comply with the terms and conditions of this permit.

\_\_\_\_\_  
TRANSFEEE

\_\_\_\_\_  
DATE



# X-Section Looking East

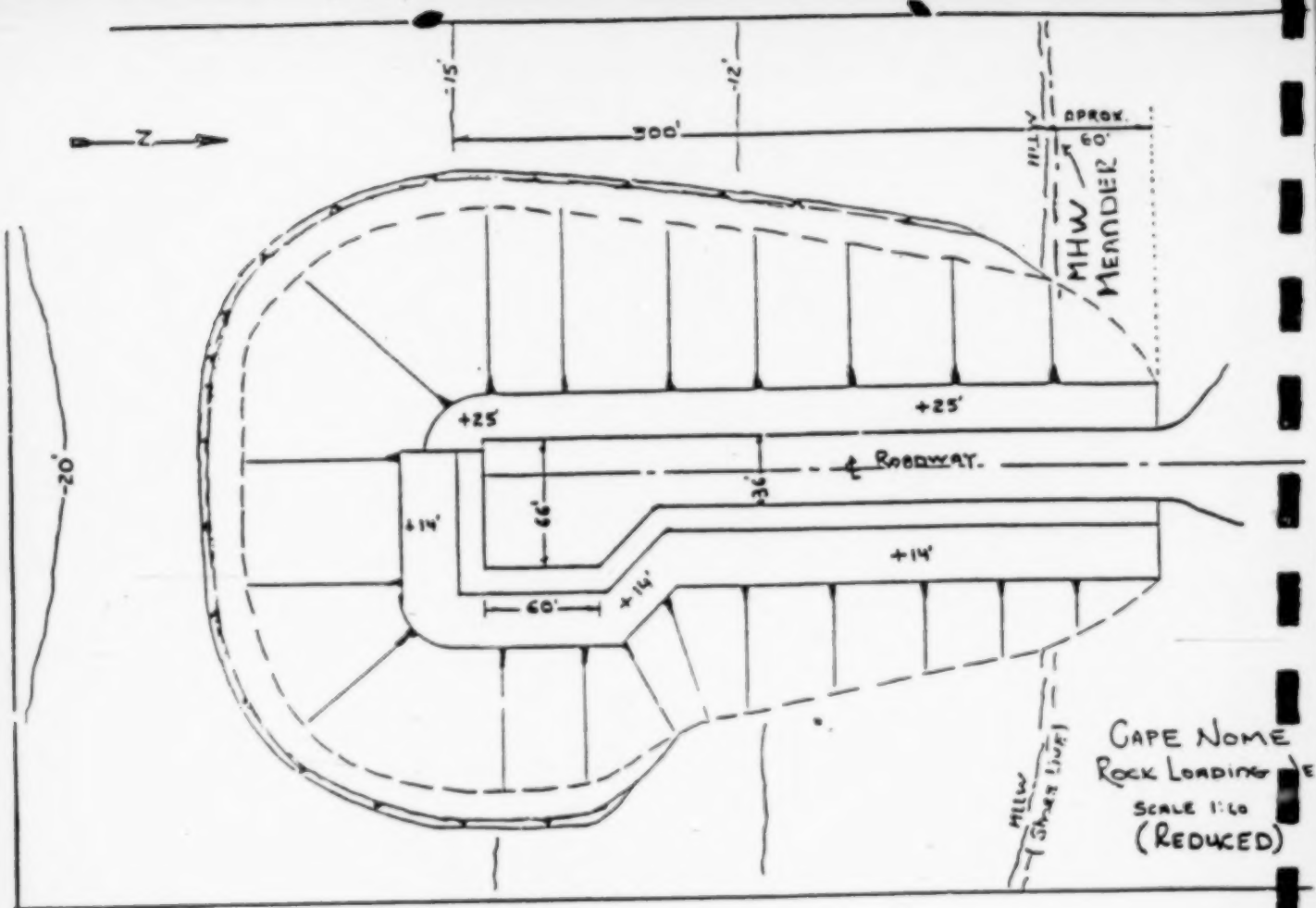


## Notes:

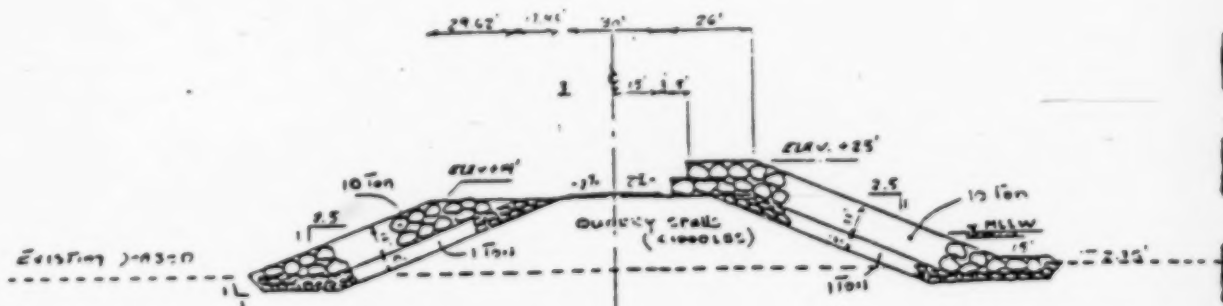
- ① Adjoining Property Owners:  
BERING STRAITS NATIVE CORP.  
SITKASUK NATIVE CORP.  
DEPT. OF NATURAL RESOURCES  
STATE OF ALASKA D.O.T./P.F.  
NATIVE ALLIANCE N818,500 PARCEL A
- ② SCALE AS SHOWN
- ③ ELEV. +30 IS ULTIMATE QUARRY FLOOR

PORT OF NOME CITY OF NOME
CAPE NOME ROCK LOADING JETTY AND ROAD REALIGNMENT
SCALE                      Date: Aug 1985

6 1985  
D.N.A.C.  
Permittee  
ed by



ELEV. 0.0 CONSIDERED AS MLLW  
TIDE RANGE;  $-0.5' \rightarrow +1.9'$



CAPE NOME ROCK LOADING JETTY  
AND ROAD REALIGNMENT

SCALE

Date: Aug 1985

CAPE NOME ROCK LOADING  
TYPICAL SECTION (APPROX)  
SCALE 1:40  
(REDUCED)

1000'

# STATE OF ALASKA

## OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET  
DIVISION OF GOVERNMENTAL COORDINATION

BILL SHEFFIELD, GOVERNOR

### CENTRAL OFFICE

POUCH AW  
JUNEAU, ALASKA 99811-0165  
PHONE: (907) 465-3562

### SOUTHEAST REGIONAL OFFICE

431 NORTH FRANKLIN  
POUCH AW, SUITE 101  
JUNEAU, ALASKA 99811-0165  
PHONE: (907) 465-3562

### SOUTHCENTRAL REGIONAL OFFICE

2600 DENALI STREET  
SUITE 700  
ANCHORAGE, ALASKA 99503-2798  
PHONE: (907) 274-1581

### NORTHERN REGIONAL OFFICE

675 SEVENTH AVENUE  
STATION H  
FAIRBANKS, ALASKA 99701-4586  
PHONE: (907) 456-3084

January 8, 1986

Certified Mail  
Return Receipt  
Requested

Mr. Lyle Larson  
City of Nome  
P.O. Box 281  
Nome, AK 99762

Dear Mr. Larson:

SUBJECT: NORTON SOUND 49; ROCK LOADING JETTY AND REALIGNMENT OF  
THE ROAD. STATE I.D. NUMBER AK85112703/F

The Division of Governmental Coordination (DGC) has completed the consistency review of your project in which you propose to construct a rock loading jetty to provide a loading facility for rock mined from the quarry. In order to provide access to the rock loading jetty and to bypass the quarry site, it is also necessary to realign the roadway.

Based on our review, the Division concurs with your consistency certification that the project is consistent with the Alaska Coastal Management Program.

This conclusive consistency determination applies to the following State and federal authorizations as per 6 AAC 50:

U.S. Army Corps of Engineers Section 10 and Section 404  
Authorizations

Department of Environmental Conservation 401 Certificate of  
Reasonable Assurance

Department of Natural Resources Tidelands Lease

FILE 15780  
T  
BILL SHEFFIELD, GOVERNOR

JAN 12 1986

**OFFICE OF THE GOVERNOR**

OFFICE OF MANAGEMENT AND BUDGET  
DIVISION OF GOVERNMENTAL COORDINATION

CENTRAL OFFICE

POUCH AW  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-3562

SOUTHEAST REGIONAL OFFICE  
211 Fourth Street  
Pouch AW, Room 306  
Juneau, AK 99811  
Phone: (907) 465-3562

SOUTHCENTRAL REGIONAL OFFICE  
3301 Eagle Street  
Suite 307  
Anchorage, AK 99503  
Phone: (907) 272-3504

NORTHERN REGIONAL OFFICE  
675 Seventh Avenue  
Station H  
Fairbanks, AK 99701  
Phone: (907) 456-3084

Certified Mail  
Return Receipt  
Requested

January 8, 1986

Mr. Lyle Larson  
City of Nome  
P.O. Box 281  
Nome, AK 99762

Dear Mr. Larson:

SUBJECT: NORTON SOUND 49; ROCK LOADING JETTY AND REALIGNMENT OF  
THE ROAD. STATE I.D. NUMBER AK85112703/F

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Authorizations

Department of Environmental Conservation 401 Certificate of  
Reasonable Assurance

Department of Natural Resources Tidelands Lease

*RM Name*

STATE OF ALASKA  
DEPT. OF ENVIRONMENTAL CONSERVATION

BILL SHEFFIELD, GOVERNOR

(907) 452-1714

January 10, 1986

Northern Regional Office  
Pouch 1801  
Fairbanks, Alaska 99707

01 13 86

CERTIFIED MAIL  
RETURN RECEIPT  
REQUESTED

Mr. Lyle Larson, City Manager  
City of Nome  
P.O. Box 281  
Nome, Alaska 99762

Dear Mr. Larson:

Re: Norton Sound 49, NPACO No. 071-OYB-2-850422

In accordance with Section 401 of the Clean Water Act of 1977 and provisions of the Alaska Water Quality Standards, the Department of Environmental Conservation is issuing the enclosed Certificate of Reasonable Assurance for the proposed placement of approximately 90,000 cubic yards of fill to construct a rock loading jetty, and place approximately 350,000 cubic yards of fill to relocate a portion of the Nome-Council Road. Approximately 40,000 cubic yards of small rock, sand and gravel, and 50,000 cubic yards of A-land B-1 armor rock would be used to construct the approximately 300 feet by 100 feet with 2:1 side slopes jetty.

This department action represents only one element of the overall project level coastal management consistency determination issued by the Office of Management and Budget under AS 44.19 and 6 AAC 50.070.

Department of Environmental Conservation regulations provide that any person who disagrees with any portion of this decision may request an adjudicator hearing in accordance with 13 AAC 15.200-310. The request should be mailed to the Commissioner of the Department of Environmental Conservation, Pouch C, Juneau, Alaska 99811, or delivered to his office at 3220 Hospital Drive, Juneau. Failure to file a statement of issues within thirty days of receipt of this letter shall constitute a waiver of your right to judicial review of this decision.

By copy of this letter we are advising the Army Corps of Engineers and the Division of Governmental Coordination of our actions and enclosing a copy of the certification for their use.

Sincerely,

*Douglas L. Lowery*

Douglas L. Lowery  
Regional Environmental Supervisor

Enclosure: Certificate of Reasonable Assurance  
cc: Corps of Engineer  
EPA, AOO  
ADL, Fairbanks

F&WS  
ADEC, Juneau  
OHE/CCU, Fairbanks



T

STATE OF ALASKA  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
CERTIFICATE OF REASONABLE ASSURANCE

A Certificate of Reasonable Assurance, as required by Section 401 of the Clean Water Act, has been requested by the City of Nome, P.O. Box 231, Nome, Alaska 99762 for the proposed placement of approximately 90,000 cubic yards of fill to construct a rock loading jetty, and place approximately 350,000 cubic yards of fill to relocate a portion of the Nome-Council Road. Approximately 40,000 cubic yards of small rock, sand and gravel, and 50,000 cubic yards of A-lan D-1 armor rock would be used to construct the approximately 300 feet by 100 feet with 2:1 side slopes jetty. The road alignment fill would consist of quarry spalls and armor rock. The dimensions of the relocated portion of the road would be approximately 4,500 feet long and 30 feet wide shoulder to shoulder. Approximately 9,500 cubic yards of material would be dredged from the jetty area to provide greater stability at the toe of the slopes before placing the fill and armor rock. The dredged material would be used as fill in the jetty. The 40,000 cubic yards of fill for the jetty would be placed by dump truck and leveled and compacted by dozer. The 50,000 cubic yards of rock would be placed by a crane with rock tongs or steel nets depending on the size of the stone. All road work would be constructed according to the Alaska Department of Transportation and Public Facilities specifications.

The proposed activity is located at Cape Nome, Alaska, Section 22, T.12S. R.22E., Kateel River Meridian.

Public Notice of the application for this certification has been made in accordance with 15 AAC-15.100.

Water Quality Certification is required for the proposed activity because the activity will be authorized by a Department of the Army Permit identified as Norton Sound 49, SPACO 071-04D-2-050422 and a discharge may result from the proposed activity.

Having reviewed the application and comments received in response to the public notice, the Alaska Department of Environmental Conservation certifies that there is reasonable assurance that the proposed activity, as well as any discharge which may result, is in compliance with the requirements of Section 401 of the Clean Water Act which includes the Alaska Water Quality Standards, 15 AAC 70, and the Standards of the Alaska Coastal Management Program, 6 AAC 30.

Date: January 10, 1986

Douglas L. Lowery  
Douglas L. Lowery  
Regional Environmental Supervisor



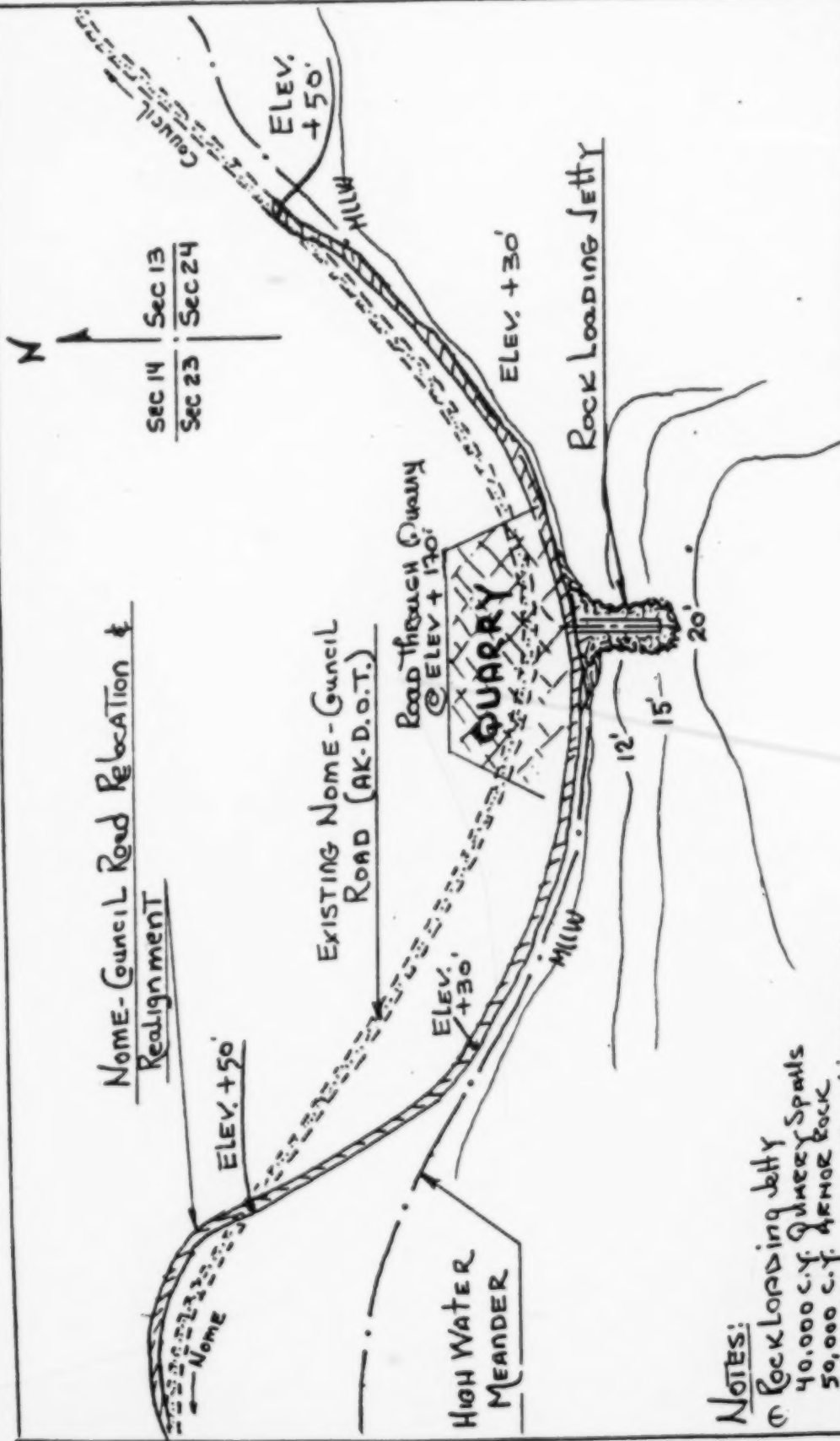


CAPE NOME ROCK LOADING JETTY  
WITH ACCESS ROAD AND ROAD REALIGNMENT

64° 26' N X 165° 00' W  
SECTION 23, T12S, R32W K.R.M.  
MILE 13.9 to MILE 15.5 NOME COUNCIL  
ROAD  
(DIST. MEASURED FROM NOME)

PORT OF NOME CITY OF NOME	
CAPE NOME ROCK LOADING JETTY	
LOCATION MAP	SCALE: AS SHOWN
	DATE: AUG '85
	FIGURE NO.: 10(0)11

# Nome-Guncivil Road Relocation & Realignment



## NOTES:

- 1) Rock Loading Jetty  
40,000 c.y. Quarry Spalls  
50,000 c.y. Armor Rock
- 2) Road Relocation/Realignment  
350,000 c.y. Quarry Spalls & armor protection
- 3) All material end dumped, large armor rock placed by crane.
- 4) All road work to A.K. D.O.T. Specs.
- 5) ELEVATIONS in Feet Relative to MLLW.
- 6) Avg. Tides -.5' to +1.9'

PORT OF NOME

CITY OF NOME

CAPE NOME ROCK LOADING JETTY  
AND ROAD REALIGNMENT

SCALE 1:60 Date: Aug 1985

11. Cape Nome, Alaska  
(Permit modification)

a. Disclaimer      No disclaimer requested

b. Corps Permit    11/24/86  
    modification

Regulatory Branch  
Permit Processing Section

PERMITTEE: City of Nome

EFFECTIVE DATE: 04 NOV 1986

EXPIRATION DATE:

REFERENCE NO. M-850422  
Norton Sound 49

DEPARTMENT OF THE ARMY  
PERMIT MODIFICATION

Department of the Army permit No. 2-850422, Norton Sound 49, was issued to the city of Nome, Post Office Box 281, Nome, Alaska 99762 on May 21, 1986, to:

"dredge approximately 9,200 cubic yards (cy) of material and place approximately 440,000 cy of dredged and fill material to construct a rock loading jetty and realign a portion of the Nome-Council Road. The 9,200 cy would be dredged to provide stability at the toe of the slope and redeposited within the jetty. A total of 40,000 cy of small rock, sand and gravel and 50,000 cy of A-1 and B-1 armor rock will be used to construct the 300'x100' jetty with 2:1 side slopes. Another 350,000 cy of quarry spalls and armor rock will be placed to realign approximately 8,500' of the roadway having a crown width of 30'."

The permit is hereby modified as follows:

"dredge approximately 9,200 cubic yards (cy) of material and place a total of approximately 564,000 cy of dredged and fill material to construct a rock loading jetty and realign a portion of the Nome-Council Road. The 9,200 cy would be dredged to provide stability at the toe of the slope and redeposited within the jetty. A total of 140,000 cy of small rock, sand and gravel and 74,000 cy of A-1 and B-1 armor rock will be used to construct a 600'x100' jetty with 2:1 side slopes, a 700'x300' storage pad east of the jetty, and approximately 110' of HP-53 piling to form a larger crane pad and tie-back wall. Three hundred and fifty thousand cubic yards of quarry spalls and armor rock will be placed to realign approximately 8,500' of the roadway having a crown width of 30'."

All other terms and conditions of the original permit remain in full force and effect.

This authorization and the enclosed modified plans should be attached to the original permit.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

SIGNED

Norman L. Sanders  
Northern Team Leader  
Permit Processing Section  
Regulatory Branch

Enclosure

✓  
CA 11/3  
Akers/orq/3-27  
5403C/3 Nov 86

Al Ott, Regional Supervisor, Region III  
Habitat Protection Section  
Alaska Department of Fish & Game  
1300 College Road  
Fairbanks, Alaska 99701

Tony Booth, Acting Field Supervisor  
Northern Alaska Ecological Services  
U.S. Fish and Wildlife Service  
Room 222, Federal Building, Box 20  
101 - 12th Avenue  
Fairbanks, Alaska 99701-6267

Doug Lowery, Regional Environmental Supervisor  
Alaska Department of Environmental  
Conservation  
Post Office Box 1601  
Fairbanks, Alaska 99707

Jan Sorice, Regional Coordinator  
Office of Management and Budget  
Division of Governmental Coordination  
675 7th Avenue, Station H  
Fairbanks, Alaska 99701

Mr. Rich Sumner  
Alaska Operations Office  
Environmental Protection Agency  
701 C Street, Box 19  
Anchorage, Alaska 99513

Ronald J. Morris, Western Alaska Ecological Supervisor  
National Marine Fisheries Service  
Federal Building, U.S. Court House  
701 C Street, Box 43  
Anchorage, Alaska 99503

Mr. Jerry Brossia  
Alaska Department of Natural Resources  
Division of Land and Water Management  
North Central District  
4420 Airport Way  
Fairbanks, Alaska 99709

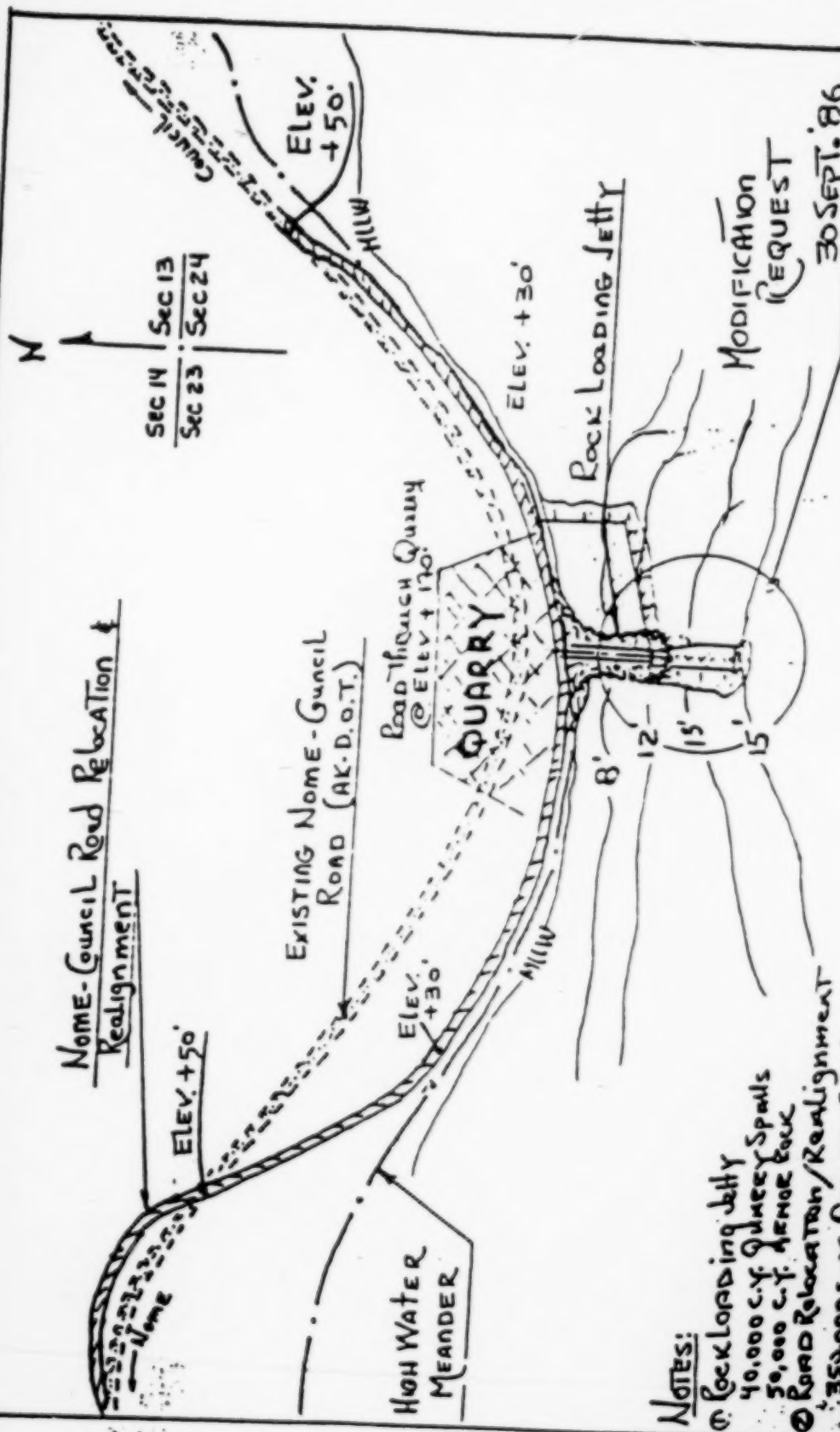
Mr. Doug Sims  
Division of Community Planning  
Fairbanks North Star Borough  
Post Office Box 1267  
Fairbanks, Alaska 99707

Mr. Theodore F. Meyers  
Environmental Assessment Division  
National Marine Fisheries Service  
Post Office Box 1668  
Juneau, Alaska 99802



1300 College  
Alaska Department of Fish & Game  
Habitat Protection Section  
Alaska Regional Supervisor, Region III

# NOME-GUNCIL ROAD RELOCATION & REALIGNMENT



## NOTES:

1. Rock loading jetty 40,000 c.y. Quarry Spalls 50,000 c.y. HEMLOCK ROCK
2. Road Relocation/Realignment 350,000 c.y. Quarry Spalls & HEMLOCK ROCK
3. ALL MATERIAL END DUMPED, LARGE HEMLOCK ROCK PLACED BY GUNCE
4. ALL ROAD WORK TO AK. D.O.T. SPECS.
5. ELEVATIONS IN FEET RELATIVE TO MLLW.
6. Ave. Tides -5' to +1.9'

PORT OF NOME
CITY OF NOME
CAPE NOME ROCK LOADING JETTY AND ROAD REALIGNMENT
SCALE 1:60      Date: Aug 1985
SHEET 1 of 6

12. Pea Island, North Carolina

a. Disclaimer 06/28/89

b. Corps Permit 06/22/89

84-211  
Permit No.

jw

STATE OF NORTH CAROLINA  
DEPARTMENT OF TRANSPORTATION  
P.O. BOX 25201  
RALEIGH 27611-5201

JAMES G. MARTIN  
GOVERNOR

DIVISION OF HIGHWAYS

JAMES E. HARRINGTON  
SECRETARY

GEORGE E. WELLS, P.E.  
STATE HIGHWAY ADMINISTRATOR

June 28, 1989

District Engineer  
U.S. Army Corps of Engineers  
P.O. Box 1890  
Wilmington, North Carolina 28402

ATTN: Regulatory Branch

Dear Sir:

We are in receipt of your May 17, 1989 letter regarding proposed work on the Oregon Inlet groin, revetment and access channel, and potential effects on the shoreline. The North Carolina Department of Transportation recognizes that planned improvements may modify the seaward boundary at the northern end of Pea Island and hereby agrees to a disclaimer that work will not affect the delineation of the coastline.

Sincerely,

A handwritten signature in cursive script, likely belonging to L. R. Goode.

L. R. Goode, PhD, PE  
Manager, Program & Policy Branch

LRG/GRM/slg  
cc: Mr. Paul B. Smyth, USDI

## DEPARTMENT OF THE ARMY PERMIT

Permittee North Carolina Department of TransportationPermit No. CESAW-CO-89-N-028-0271Issuing Office CESAW-CO-EP

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

## Project Description:

To construct a revetment and terminal groin, including excavation of a work channel, on the Atlantic Ocean, Oregon Inlet, at the north end of Pea Island

## Project Location:

Dare County, North Carolina

## Permit Conditions:

## General Conditions:

1. The time limit for completing the work authorized ends on December 31, 1992. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.
2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.
3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

**Special Conditions:**

See attached sheet.

**Further Information:**

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(☒) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(☒) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 108 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1418).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or use thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or use thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

- a. Damage claims associated with any future modification, suspension, or revocation of this permit.
4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.
5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:
  - a. You fail to comply with the terms and conditions of this permit.
  - b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).
  - c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 329.7 or enforcement procedures such as those contained in 33 CFR 329.4 and 329.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 208.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

North Carolina Department of Transportation

J. E. Blair  
(PERMITTEE)

6/22/89  
(DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

Paul W. Woodbury  
(DISTRICT ENGINEER)

PAUL W. WOODBURY

6/26/89  
(DATE)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

\_\_\_\_\_  
(TRANSFEREE)

\_\_\_\_\_  
(DATE)



SPECIAL CONDITIONS

a. The revetment/groin material will be clean and free of any pollutants except in trace quantities. Metal products, organic materials, or unsightly debris will not be used.

b. Revetment/groin material will be of such size so as to not be washed away by tide or wave action.

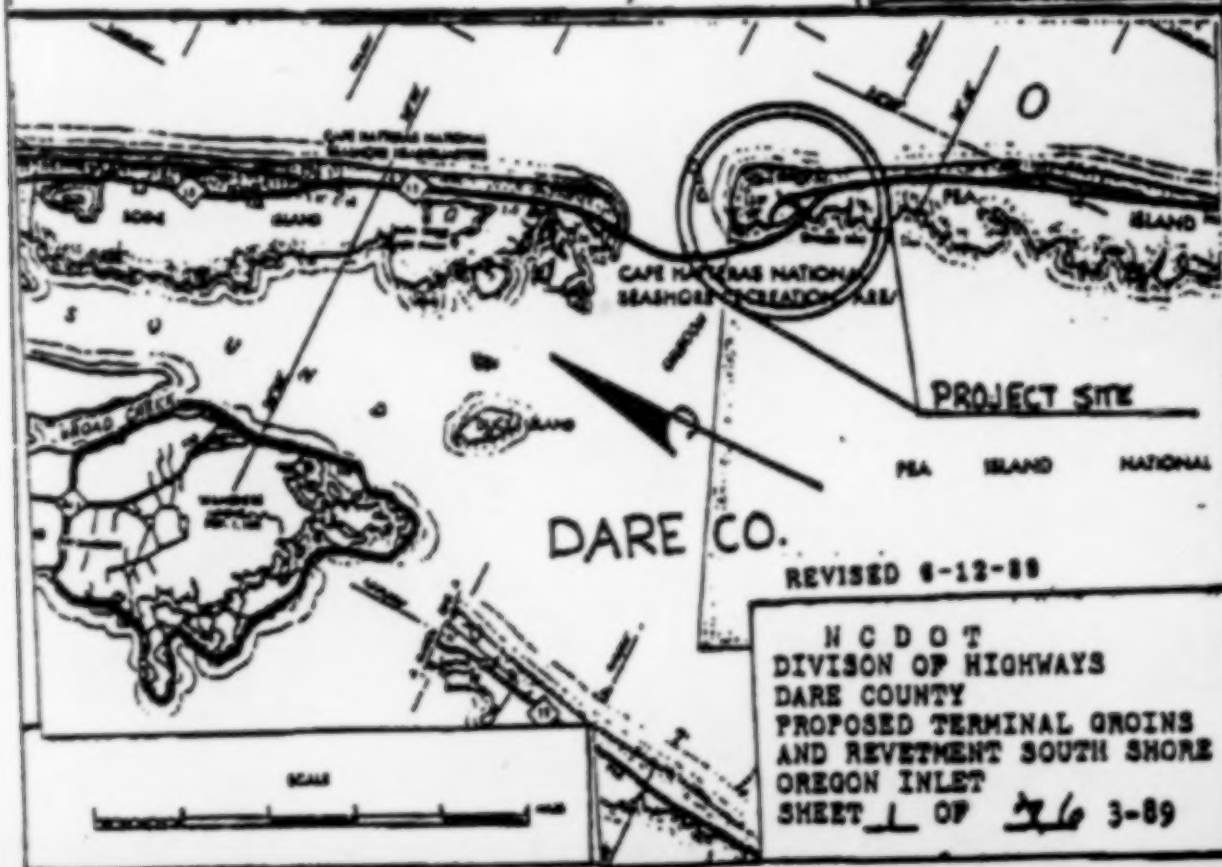
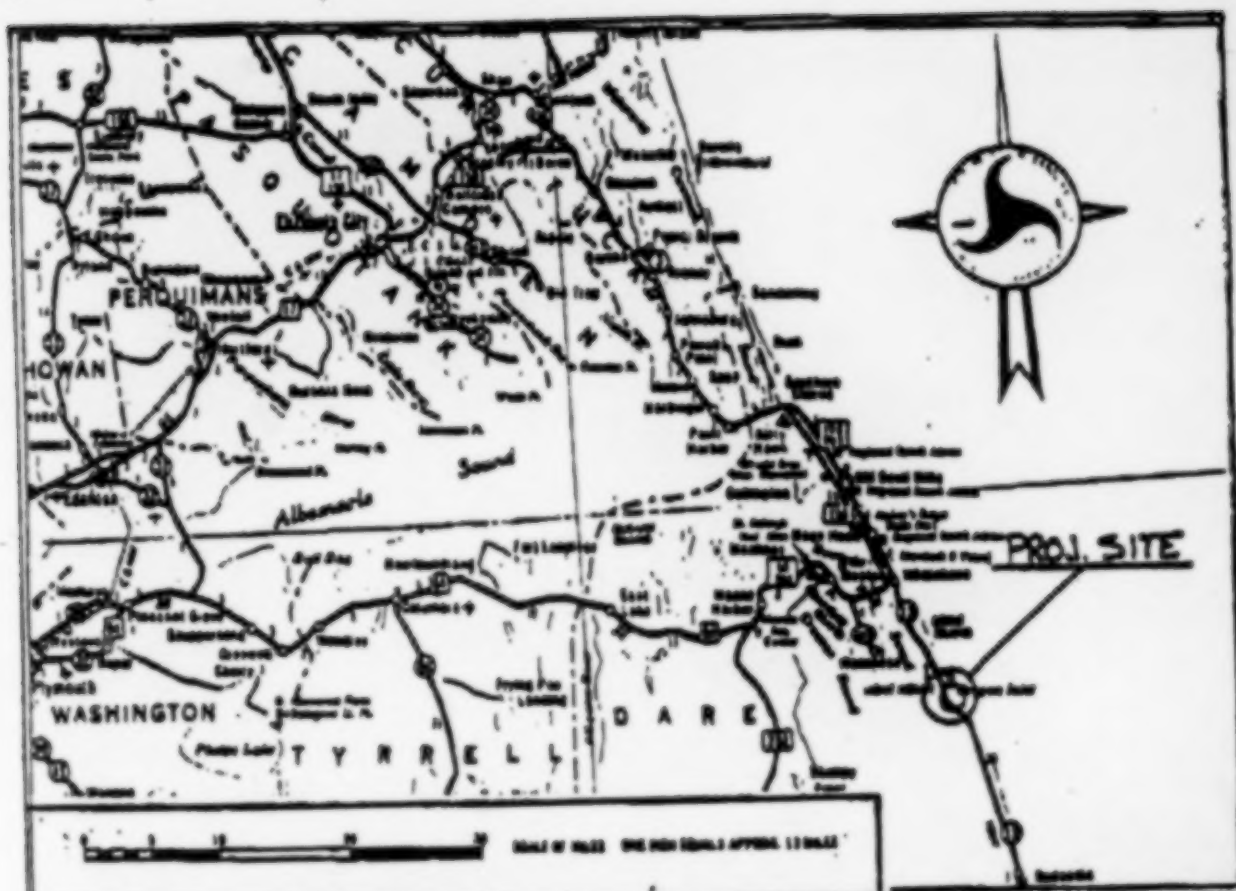
c. Excavation will not exceed 13 feet (+ 2 feet) below the elevation of mean low water (MLW).

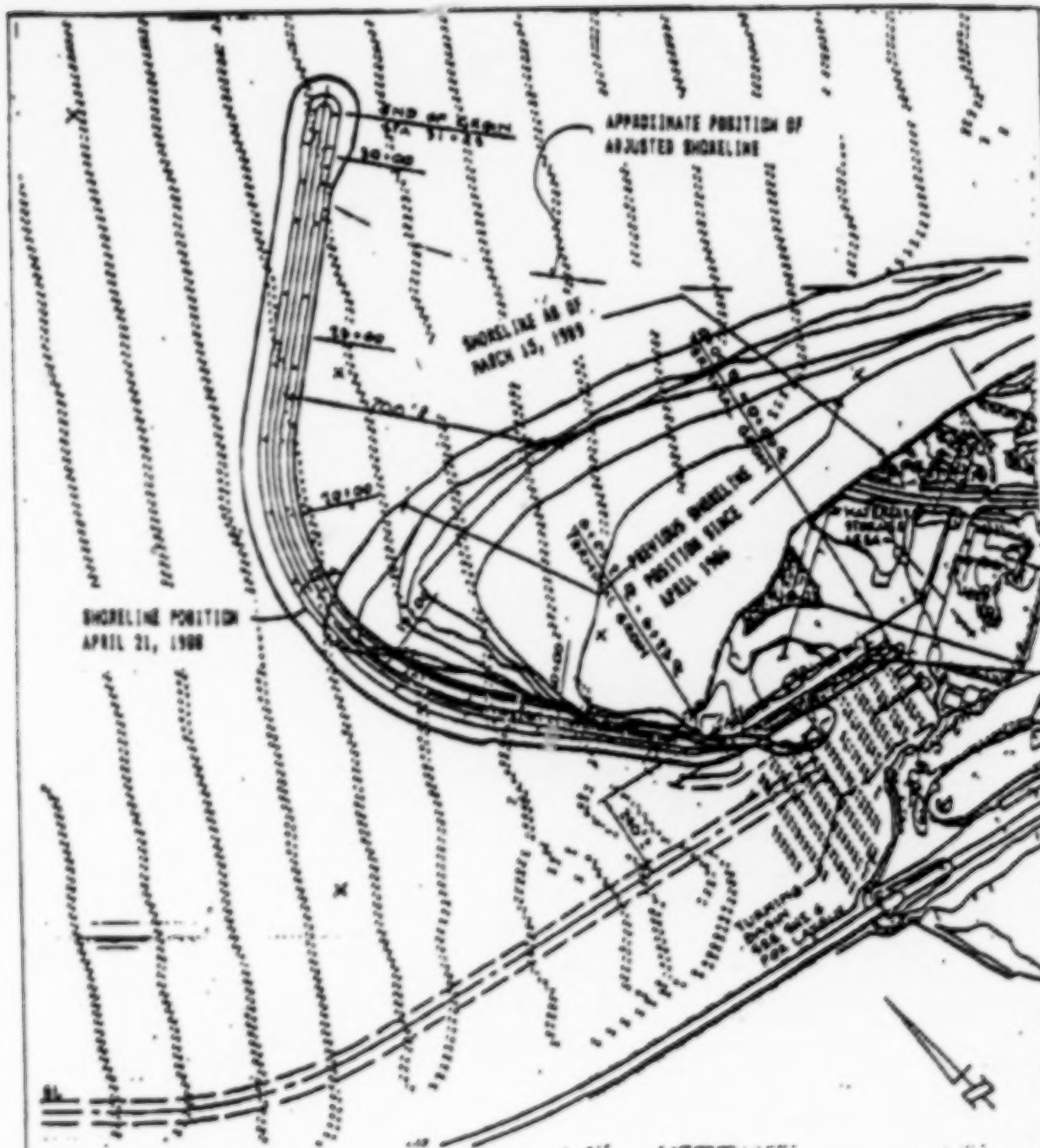
d. The activity will be conducted in such a manner as to prevent a significant increase in turbidity outside the area of construction or construction-related discharge. Increases such that the turbidity of 25 NTU's or less will not be considered significant.

e. The National Ocean Survey (NOS) has been notified of this authorization. The permittee must notify NOS and the Wilmington District Engineer upon completion of the authorized work. The notification of completion will include a drawing which certifies the location and configuration of the completed work (a certified permit drawing may be used). Notification to NOS will be sent to the following address: Director, National Ocean Survey (H/CG 222), Rockville, Maryland 20852.

f. Should previously unknown historic or archeological resources be discovered while accomplishing the authorized work, the permittee will immediately notify the Wilmington District Engineer who will initiate the required coordination pursuant to Section 106 of the National Historic Preservation Act of 1966.

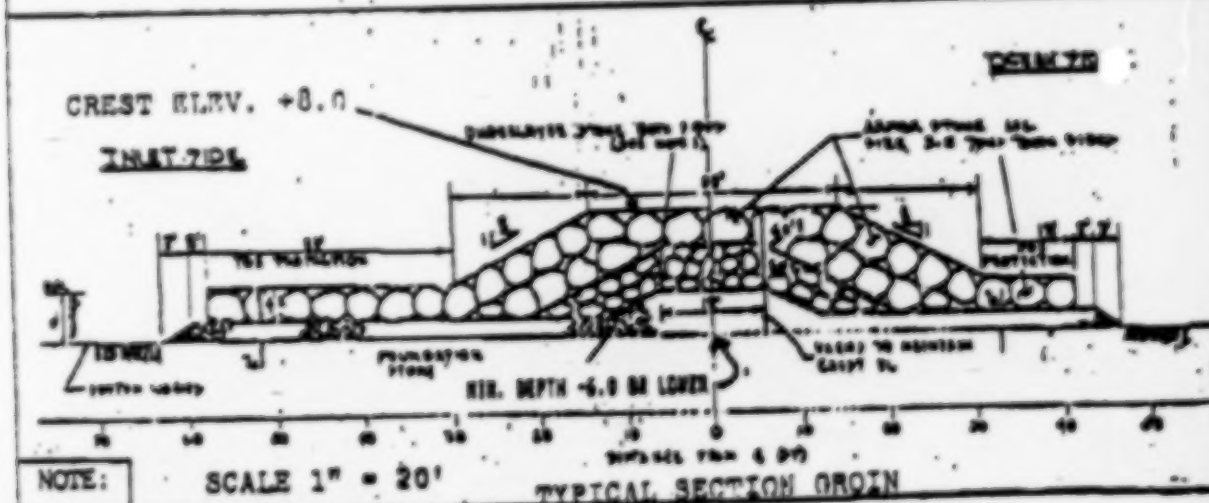
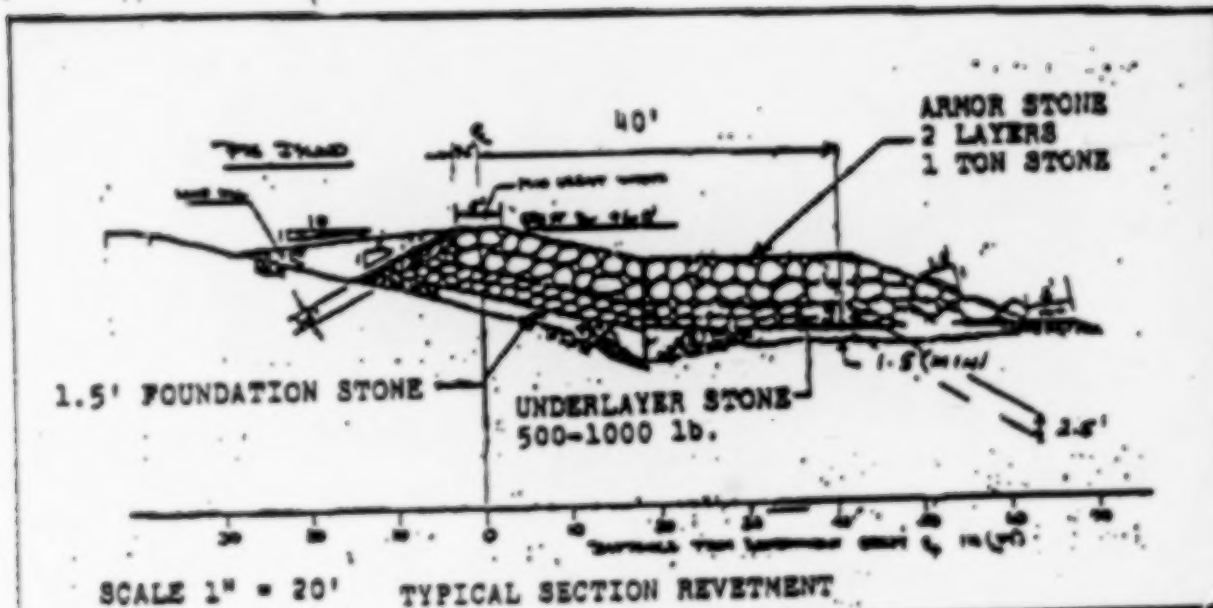
Note: It is hereby acknowledged that the N.C. Department of Transportation has been permitted by the U.S. Department of the Interior, pursuant to 50 CFR 29.21, to use and occupy lands and waters of the Pea Island National Wildlife Refuge for the purpose of accomplishing the work authorized by this Department of the Army permit. Also, this "Special Use" permit is considered to represent the overall views of the U.S. Department of the Interior with respect to the Fish and Wildlife Coordination Act and the Endangered Species Act.





REVISED 6-12-89

N.C.D.O.T.  
DIVISION OF HIGHWAYS  
DARE COUNTY  
PROPOSED TERMINAL GROINS  
AND REVETMENT SOUTH SHORE  
OREGON INLET  
SHEET 2 OF 76 3-89



NOTE:

Dimension and stone size are approximate and subject to revision during design detailing.

## NOTES:

1. Optional underlayer stone can be 500 to 1000 lb. dense stone with S.G. +/- 2.58 or marine limestone 350 to 650 lbs. with S.G. +/- 1.85
2. Foundation stone can be quarry run dense stone or marine limestone—see specs for gradation.
3. Underlayer stone for revetment section can be 4 to 365 lbs. dense stone with S.G. +/- 2.58 or marine limestone 30 to 265 lbs. with S.G. +/- 1.85

## NOTES:

1. Optional Underlayer stone can be 500 to 1000 lb. dense stone with S.G. +/- 2.58 with S.G.

## NOTE:

See Sheet 4 of 7 for quantities.

REVISED 8-12-89

N.C.D.O.T.  
DIVISION OF HIGHWAYS  
DARE COUNTY  
PROPOSED TERMINAL GROINS  
AND REVETMENT SOUTH SHORE  
OREGON INLET  
SHEET 3 OF 67 3-89

APPROXIMATE ESTIMATE OF MATERIAL QUANTITIES  
TERMINAL GROIN AND REVETMENT AT THE  
NORTH END OF PEA ISLAND

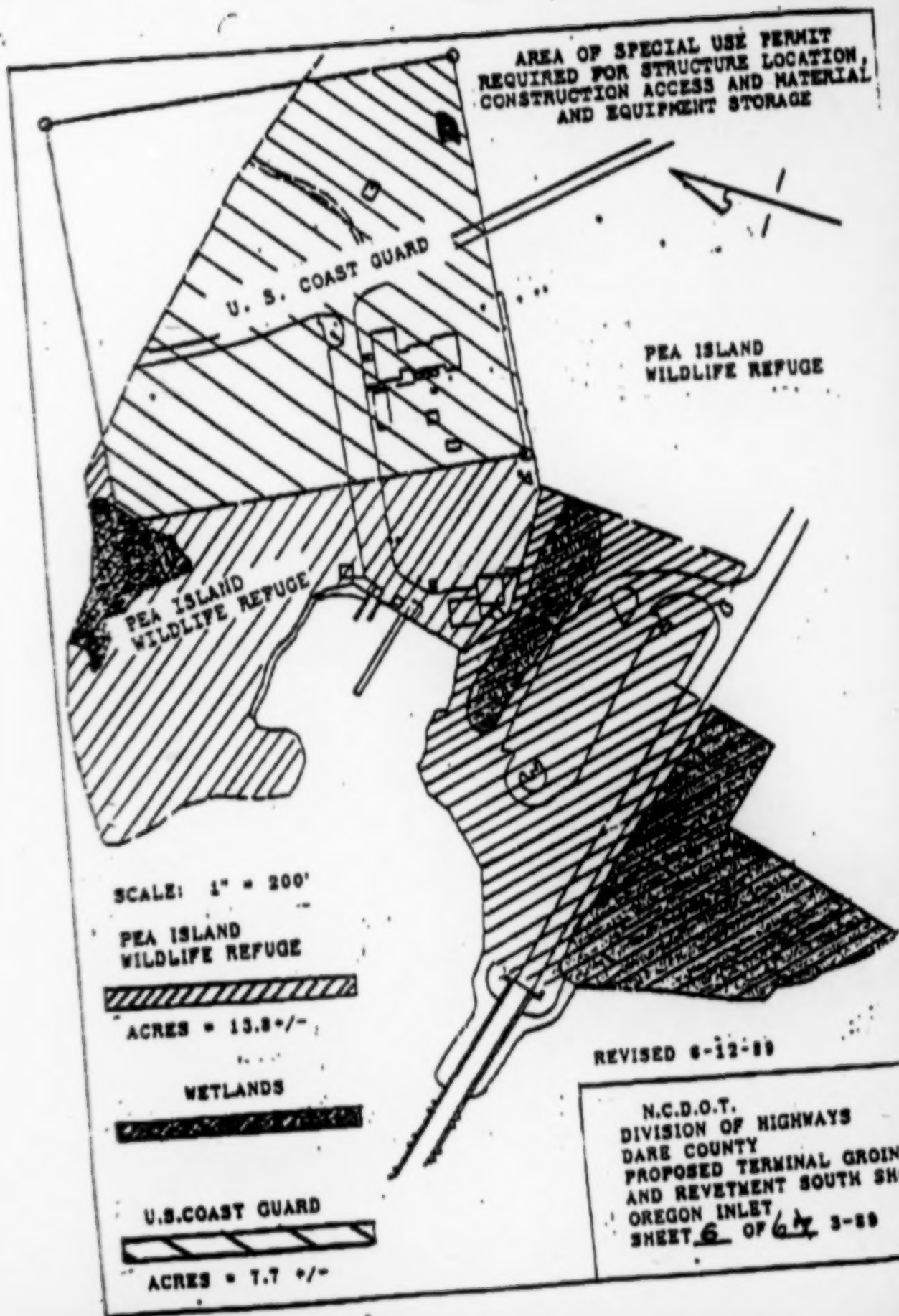
TYPE OF MATERIAL	QUANTITY
1 Ton Granitic Armor Stone	4,100 tons
3.5 Ton Granitic Armor Stone	36,900 tons
9.0 Ton Granitic Armor Stone	72,900 tons
145 lb. Marine Limestone Underlayer	3,800 tons
800 lb. Marine Limestone Underlayer	11,000 tons
1500 lb. Marine Limestone Underlayer	15,800 tons
Foundation Stone	62,300 tons
Excavation and Fill	75,000 cu. yds.

Marine Limestone is optional, can be replaced by comparable size (ie linear dimensions) granitic stone.

REVISED 6-12-89

H C D O T  
DIVISION OF HIGHWAYS  
DARE COUNTY  
PROPOSED TERMINAL GROINS  
AND REVETMENT SOUTH SHORE  
OREGON INLET  
SHEET 4 OF 64 3-89







13. Pt. McIntyre, Alaska

a. Disclaimer 06/19/90

b. Corps Permit Not retrieved from files or  
archives in time for lodging

## DISCLAIMER

WHEREAS, ARCO Alaska, Incorporated, has applied to the United States Army Corps of Engineers for a permit to place gravel in waters of the U.S. in connection with development of the Point McIntyre oil reservoir;

WHEREAS, the project for which ARCO is seeking the Corps of Engineers permit is fundamental to development of the Point McIntyre oil reservoir;

WHEREAS, both statewide and nationwide benefits will be derived from the proposed Point McIntyre development project through increased employment, increased revenues generated, increased domestic production of petroleum, and enhanced economic opportunities in the U.S.;

WHEREAS, under the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., gravel placement in waters of the U.S. as a result of the Point McIntyre project might affect the location of the coast line and boundary of the State of Alaska, including the offshore boundary between the outer continental shelf and state-owned lands beneath navigable water;

WHEREAS, under 33 C.F.R. § 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of the Interior if a project for which a permit is sought might affect the coast line;

WHEREAS, the Corps of Engineers has consulted the Attorney General and the Solicitor pursuant to 33 C.F.R. § 320.4(f);

WHEREAS, the Corps of Engineers has been requested by the Attorney General and the Solicitor to withhold approval of ARCO's permit application because of the potential effect on Alaska's coast line;

WHEREAS, the Corps of Engineers has determined that it will not issue such a permit over the Attorney General's and the Solicitor's objections on this ground;

WHEREAS, the Attorney General's and the Solicitor's objections to the permit application on this ground would be removed if a binding disclaimer is entered by the State of Alaska to the effect that Alaska does not, and will not, treat gravel placed in connection with the Point McIntyre project as extending its coast line for purposes of the Submerged Lands Act;

WHEREAS, the Alaska Attorney General, in a formal opinion dated October 29, 1980, concluded that the Alaska Commissioner of Natural Resources has the power to issue such a disclaimer;

WHEREAS, Alaska would enter such a disclaimer without objections if the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska and the United States disagree as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, Alaska would not enter such a disclaimer but for the Corps of Engineers' determination that it will not issue the permit unless such a disclaimer is entered, thereby removing the Attorney General's and the Solicitor's objections to issuance of the permit;

WHEREAS, it is neither in the United States' interest nor in Alaska's interest to delay the Point McIntyre development project while the question of the Corps of Engineers' legal authority to require such a disclaimer is resolved;

WHEREAS, this disclaimer is entered without prejudice to Alaska's right to file an appropriate action to determine whether the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit;

WHEREAS, this disclaimer is fully effective and binding upon the State of Alaska, but becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction that the Corps of Engineers does not have the legal authority to require such a disclaimer prior to issuing such a permit; and

WHEREAS, it is the intent of both the United States and Alaska that this disclaimer remove the Attorney General's and the Solicitor's objections to issuance of the permit to place gravel in waters of the U.S. in connection with development of the Point McIntyre oil reservoir, thereby allowing the project to proceed, while at the same time preserving both the United States' legitimate interest is not having Alaska's coast line extended if the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit and Alaska's interest in not being bound by such a disclaimer if the Corps of Engineers does not have such legal authority;

THEREFORE, The State of Alaska, acting by and through the Commissioner of Natural Resources, pursuant to the authority granted to the commissioner by art. VIII, sec. 1 of the Alaska Constitution, AS 38.05.020(b), AS 38.05.027(a), and AS 38.05.035(a)(14), declares and agrees as follows:

1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the placement of gravel in the waters of the U.S. in connection with development of the Point McIntyre oil reservoir. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the Point McIntyre project as extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Attorney General and maintains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is not an admission by the State of Alaska or by the United States as to the present location of the shore line, coast line, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

14. Collier County, Florida

a. Disclaimer 07/13/90

b. Corps Permit 04/05/90

STATE OF FLORIDA  
DEPARTMENT OF NATURAL RESOURCES

Marjory Stoneman Douglas Building • 3900 Commonwealth Boulevard • Tallahassee, Florida 32399  
Tom Gardner, Executive Director

July 13, 1990

Mr. Osvaldo Collazo  
Regulatory Division, South Permits Branch  
Jacksonville District Corps of Engineers  
Post Office Box 4970  
Jacksonville, Florida 32232

RE: COE Permit No. 88-20290  
Marco Island Renourishment Project  
Collier County, Florida

Dear Mr. Collazo:

I have been requested by Mr. Ken Humiston, Coastal Engineering Consultants, Inc., to respond to you regarding Special Condition (i), page 3, of the above referenced permit. This condition requires the permittee, Collier County, to obtain a disclaimer from the State of Florida agreeing that the proposed renourishment project will not affect the delimitation of the coastline.

In the case of United States v. Florida, 425 U.S. 791, 96 S.Ct. 1840, 48 L.Ed.2d 388 (1976), the United States Supreme Court entered a decree establishing the boundaries of the State of Florida for the purpose of the Submerged Lands Act, 43 U.S.C. §1313. The decision also gave effect to the Supplemental Report of the Special Master filed January 26, 1976, which contains an agreement between the United States and the State of Florida that certain charts to be constructed from a joint state/federal mapping project then being conducted would accurately depict Florida's 1868 coastline. Apparently, no field location of this coastline has yet been determined and agreed to by the parties.

At the January 23, 1990, meeting of Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, the concerns of the Department of the Interior regarding the potential impact of beach renourishment projects on Florida's coastline for purposes of the Submerged Lands Act were addressed, and the Board of Trustees was advised by staff that a memorandum of agreement would be developed and presented at a later meeting. A copy of the approved agenda item is enclosed.



Administration	Beaches and Shores	Law Enforcement	Marine Resources	Recreation and Parks	Resource Management	State Lands
Bob Martinez Governor	Jim Smith Secretary of State	Bob Butterworth Attorney General	Gerald Lewis State Comptroller	Tom Gallagher State Treasurer	Dwyle Conner Commissioner of Agriculture	Betty Caston Commissioner of Education

Mr. Osvaldo Collazo  
July 13, 1990  
Page Two

Although a formal document implementing the 1976 agreement between the United States and the State of Florida has not yet been prepared, I can assure you that it is neither the intent nor within the power of the State of Florida to extend its seaward boundaries through beach nourishment projects such as the Marco Island project, and I, on behalf of the Board of Trustees of the Internal Improvement Trust Fund, hereby agree that the work proposed to be performed by Collier County under the above-referenced permit shall in no way be construed or used to alter or affect the delimitation of Florida's coastline for purposes of 43 U.S.C. §1313, the Submerged Lands Act. Moreover, I have been assured by Mr. Humiston that surveys of the prefill mean high water and mean low water lines have been prepared by or at the direction of Coastal Engineering Consultants, Inc., for the project area and will be made available to the United States in the event a question arises as to the location of the coastline prior to the beach nourishment project.

I would appreciate it very much if the Corps of Engineers will consider this letter as complying with Special Condition (i), page 3 of Permit 88-20290 and allow Collier County to proceed with the beach nourishment project.

Sincerely yours,

*Eugene E. McClellan, Jr.*  
Eugene E. McClellan, Jr.  
Assistant General Counsel

EEM/csr  
Enclosure  
cc: Ken Humiston  
Ken Plante



.....  
Item 23 Collier County Board of County Commissioners Erosion Control Line

Upon motion by Mr. Lewis, seconded by Mr. Butterworth, and without objection, the following item was approved.

REQUEST: The establishment of an erosion control line.

COUNTY: Collier

APPLICANT: Collier County Board of County Commissioners

LOCATION: The line of mean high water of the Gulf of Mexico in Sections 6, 7, 18 and 19, Township 52 South, Range 26 East, known as Marco Island.

CONSIDERATION: N/A

STAFF REMARKS: Procedures required by chapter 161, F.S., have been followed and a public hearing on behalf of the Board of Trustees was held pursuant to notices published in accordance with the law.

The hearing officer's report reflects the existence of conditions justifying the establishment of an erosion control line for pursuing a necessary program of beach nourishment to that area of beach spanned by the line.

Historically, the Board of Trustees have waived the fee for state-owned material necessary for beach nourishment projects placed landward of the proposed erosion control line.

Recently the U. S. Department of Interior has registered concerns that the addition of beach nourishment to Florida's beaches may alter the state's territorial limits by moving the boundary seaward and this change in the boundary could thereby infringe on the federal government's claim of ownership seaward of the existing territorial limit. The establishment of the erosion control line is based on the condition of erosion control.

DEPARTMENT OF THE ARMY PERMIT

Permittee: COLLIER COUNTY BOARD OF COUNTY COMMISSIONERS

Permit Number: 88IPC-20290 (DUPLICATE)

Issuing Office: U.S. Army Engineer District, Jacksonville

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

**Project Description:** The project is to conduct long term (15 year) periodic renourishment of 2.6 miles of beach on Marco Island by initially dredging 1.18 million cubic yards of material from two borrow areas in Big Marco Pass and one borrow area in Caxambas Pass and pumping the material to the beach as shown in the permit drawings. This project also includes the construction of three offshore breakwaters and two terminal groins at the south end of Marco Island.

The work described above is shown on the attached plans numbered 88IPC-20290 in 28 sheets; dated Feb 1990.

**Project Location:** Gulf of Mexico, Marco Pass to Caxambas Pass, Sections 6 and 7, Township 52 South, Range 26 East, Marco Island, Collier County, Florida.

**Permit Conditions:**

**General Conditions:**

- APR 05 95
1. The time limit for completing the work authorized ends on APR 05 95. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.
  2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.
  3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state

coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

**Special Conditions:**

a. The permittee agrees that the contractor will instruct all personnel associated with construction of the facility of the presence of manatees and the need to avoid collisions with manatees. (PI)

b. The permittee agrees that all construction personnel will be advised that there are civil and criminal penalties for harming, harassing, or killing manatees which are protected under the Endangered Species Act of 1973 and the Marine Mammal Protection Act of 1972. The permittee and/or contractor will be held responsible for any manatee harmed, harassed, or killed as a result of construction of the project. (PI)

c. The permittee agrees that during construction, any collision with a manatee shall be reported immediately on the manatee "hotline" (1-800-342-1821) and to the U.S. Fish and Wildlife Service, Jacksonville Endangered Species Field Station (904-791-2580). (PI)

d. The permittee agrees that the contractor shall keep a log detailing sightings, collisions, or injury to manatees which have occurred during the contract period. (PI)

e. The permittee agrees that following project completion, a report summarizing the above incidents and sightings will be submitted to the Chief, Regulatory Division, Jacksonville District, Corps of Engineers (Post Office Box 4970, Jacksonville, Florida 32232-0019) and to the U.S. Fish and Wildlife Service (P.O. Box 2676, Vero Beach, Florida 32961-2676). (PI)

f. The permittee agrees that all vessels associated with the project construction will operate at "no-wake" speeds at all times while in water where the draft of the vessel provides less than a 3-foot clearance from the bottom and that vessels will follow routes of deep water to the extent possible. (PI)

g. That the permittee agrees to conduct a sea turtle nest relocation program along the affected beach employing a qualified contractor under a valid permit from Florida DNR. The beach will be surveyed daily at daybreak between April 1 and

September 15; or beginning 65 days prior to beginning construction or moving equipment to the beach. Nests laid in the affected area will be relocated to a beach hatchery. Hatching success will be monitored. A final report summarizing the results of the nest relocation program, including any problems or data needs, will be submitted at the project conclusion to the U.S. Fish and Wildlife Service (P.O. Box 2676, Vero Beach, Florida 32961-2676). (PI)

h. The permittee agrees to till the renourished beach to depth of 36 inches if the compaction rate exceeds 500 psi as measured by a penetrometer. (PI)

i. The permittee agrees that prior to initiating any work they must obtain a disclaimer from the State of Florida agreeing that the proposed work will not affect the delimitation of the coastline. (PI)

j. The permittee agrees to avoid any dredge work in a portion of borrow area 3, as indicated on drawing 28 of 28, and in borrow area 4, to avoid disturbance of anomalies. If avoidance of these borrow areas is not feasible, the anomalies must be ground-truthed and assessed as to their archaeological significance. The resultant report must be forwarded to the Florida Department of State, Division of Historical Resources, R.A. Gray Building, 500 South Bronough, Tallahassee, Florida 32399-0250. (LR)

k. The permittee agrees to update us at the time the State Department of Environmental Regulation makes its periodic 5-year review of the maintenance project. (PI)

#### Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal projects.

3. Limits of Federal Liability. In issuing this permit, the Federal Government



does not assume any liability for the following:

- a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.
  - b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.
  - c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.
  - d. Design or construction deficiencies associated with the permitted work.
  - e. Damage claims associated with any future modification, suspension, or revocation of this permit.
4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.
5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:
- a. You fail to comply with the terms and conditions of this permit.
  - b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (see 4 above).
  - c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

Max A. Hasse, Jr.  
(PERMITTEE) Max A. Hasse, Jr., Chairman  
Board of County Commissioners

3/20/90  
(DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

Bruce A. Malson  
(DISTRICT ENGINEER)  
Bruce A. Malson  
Colonel, U.S. Army

APR. 05 1990  
(DATE)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

\_\_\_\_\_  
(TRANSFEREE)

\_\_\_\_\_  
(DATE)

\*ATTEST: (as to signature of Max A. Hasse, Jr.)

James E. Giles, Clerk of Courts  
James E. Giles, Clerk of Courts

Approved as to form & legal sufficiency

David C. Davis  
HSS County Attorney



# MARCO ISLAND BEACH RESTORATION

RECEIVED  
BUD. OF CORAL

FEB 06 1993

PREPARED FOR

COLLIER COUNTY BOARD OF COMMISSIONERS

## LEGEND

- XX EXISTING ELEVATION (N.G.V.D. 1929)
- △ CHAIKEL MARKER
- D "T&R" D.N.R. MONUMENTS
- PRM PERMANENT REFERENCE MARKER
- XX SOIL BORINGS
- CCCL COASTAL CONSTRUCTION CONTROL LINE
- AQUATIC PRESERVE LINE
- TOPO PROFILE LINE
- APPROXIMATE MEAN HIGH WATER LINE



LOCATION MAP

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| 5     | BIG MARCO AREA BORROW           |
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## REVISIONS

NO.	DATE	DESCRIPTION	AUTH.

PERMIT NO. 111460389

PREPARED BY

COASTAL ENGINEERING CONSULTANTS, INC.

CONSULTING & CIVIL ENGINEERS • PLANNERS • SURVEYORS • DESIGNERS

3106 S. HONOLULU DRIVE  
TALLAHASSEE, FLORIDA 32302

OCTOBER 1987

PROJECT No. B7004  
FILE No. B7004  
SHEET 1 OF 2328

88IFC-20290

27 Feb 1990

15. Folly Beach, South Carolina

a. Disclaimer 07/19/91

b. Corps Permit Not required for project  
done by Army Corps

## AGREEMENT

WHEREAS, by virtue of its sovereignty the State of South Carolina is the owner of certain tidelands and submerged lands within the State;

WHEREAS, by virtue of South Carolina Code Section 1-11-70, the State Budget and Control Board is authorized to control and direct all vacant lands owned by the State of South Carolina;

WHEREAS, the United States Congress in Public Law 99-662, Title V, Sec. 501(a), has authorized a project for shoreline protection on Folly Beach, Charleston County, South Carolina;

WHEREAS, the shoreline protection project at Folly Beach may affect the three-mile offshore ownership boundary of the State separating outer continental shelf lands of the United States from tide- and submerged lands owned by the State of South Carolina;

WHEREAS, the United States Code in Title 43 U.S.C.A. Section 1312, Seaward Boundaries of States, provides as follows:

The seaward boundary of each original coastal State is hereby approved and confirmed as a

line three geographical miles distant from its coast line. . . .

WHEREAS, when constructed, the proposed shoreline protection project may temporarily increase the State's three-mile ownership boundary a few hundred feet seaward;

WHEREAS, therefore the United States has requested a waiver of any change in the boundary between State owned submerged lands and outer continental shelf lands of the United States, as a result of the proposed Folly Beach project for shoreline protection;

WHEREAS, Section 3-7-10 of the South Carolina Code provides as follows:

The State, the agencies of the State, the governing bodies of the counties and municipalities are authorized to adopt resolutions or ordinances of assurances required by the Secretary of the Army or the Chief of Engineers for the fulfillment of the required items of local cooperation as expressed in the appropriate acts of Congress of congressional documents upon a determination by the State, State agencies, governing bodies of the counties or municipalities that a project will accrue to the general or special benefit of the governing authority, may contract or otherwise commit itself to the United States to provide the necessary interest in lands and all existing structures on the lands, to make contributions of money or property in lieu of providing disposal areas for dredge materials, to hold the United States safe and harmless from damages done or caused to be done or for any claim or demand whatsoever for such damages suffered by or done to any property on

which work is being performed and to provide or satisfy any other items or conditions of local cooperation as required by the Secretary of the Army or in the congressional documents covering the particular project.

WHEREAS, the South Carolina Budget and Control Board approved at its regularly scheduled meeting on July 17, 1991 1991, a waiver of any extension of the State's three-mile limit as a result of the proposed Folly Beach shoreline protection project.

NOW, THEREFORE, by virtue of South Carolina Code Section 3-7-10, the State of South Carolina, by and through the State Budget and Control Board and with the approval of the Governor, waives any change to the three-mile limit as a result of the proposed Folly Beach shoreline protection project.

This Agreement is solely a waiver of the effect, if any, of the construction of the Folly Beach shoreline protection project as presented in the Folly Beach General Design Memorandum dated May 1991, on the three-mile limit of the State of South Carolina and is in no way an agreement as to the location of that boundary by either the State of South Carolina or the United States.

This Agreement is conditioned upon construction of the Folly Beach shoreline protection project and shall be null and void if, for any reason, said Folly Beach shoreline protection project is not constructed.

ACCEPTED:

UNITED STATES OF AMERICA

BY: 

MARK E. VINCENT  
LTC, Corps of Engineers  
Commanding

DATE: 7/6/91

STATE OF SOUTH CAROLINA

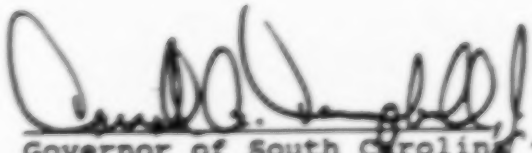
Acting by and through  
State Budget and Control Board

BY: 

Dr. Jesse A. Coles  
Executive Director

DATE: 7-18-91

IN APPROVAL WHEREOF, I, CARROLL CAMPBELL Governor of the State of South Carolina have set my hand and caused the Seal of the State of South Carolina, this 19th day of July 1991.

  
Governor of South Carolina



16. Wainwright, Alaska

a. Disclaimer 10/23/91

b. Corps Permit Pending

# DISCLAIMER

WHEREAS, the North Slope Borough ("North Slope") has applied to the United States Army Corps of Engineers for a permit to dredge approximately offshore fill material from the seabed for discharge of the fill onto beach areas at Wainwright Alaska;

WHEREAS, the project for which the North Slope is seeking the Corps of Engineers' permit is necessary to prevent erosion of the coastal beaches in the areas;

WHEREAS, the State of Alaska believes that the project will benefit the public interest criteria under 33 C.F.R. § 320.4(a), and that the permit for the project should be issued by the Corps of Engineers;

WHEREAS, the Solicitor of the Department of the Interior requested "prior to any approval of the proposed construction," the Corps of Engineers obtain a disclaimer from Alaska agreeing that the proposed work will not affect the delimitation of the coastline (see attached letter dated June 21, 1991);

WHEREAS, based on the letter from the Office of the Solicitor, the Corps of Engineers also has requested such a disclaimer and stated the permit application will not be processed until the disclaimer is provided (see attached letter dated July 15, 1991);

WHEREAS, the State of Alaska does not believe that the replenishment of beach areas will affect the coastline;

WHEREAS, under 33 C.F.R. § 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of Interior if a project for which a permit is sought might affect the coastline;

WHEREAS, the Corps of Engineers has determined that it will not process the application if the North Slope thereby prevents issuance of a permit because of the Solicitor's objections on this ground;

WHEREAS, the Solicitor's objections to the permit application would be removed if a disclaimer is entered by the State of Alaska to the effect that Alaska agrees the project will not affect "Alaska's coastline under the Submerged Lands Act 43 U.S.C. §§ 1301-1315 (see letter of Solicitor dated June 21, 1991);

WHEREAS, the Corps of Engineers' objection to the permit application would be removed if a disclaimer is whereby State of Alaska agrees that the proposed works would not affect the delimitation of the coastline, thereby affecting the territorial

sea;

WHEREAS, the Alaska Attorney General, in a formal opinion dated October 29, 1980, concluded that the Alaska Commissioner of Natural Resources has the power to issue such a disclaimer;

WHEREAS, Alaska would enter such a disclaimer without objection if the Corps of Engineers has the legal authority to require the state to enter such disclaimer before issuing such a permit;

WHEREAS, Alaska and the United States disagree as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, the Corps of Engineers' authority to require such disclaimers is at issue in U.S. v. Alaska, No. 118, original in the U.S. Supreme Court, October 1991 term.

WHEREAS, Alaska would not enter such a disclaimer but for the Corps of Engineers' determination that it will not act on the application and issue the permit unless such a disclaimer is entered, thereby removing the Solicitor's objections to issuance of the permit;

WHEREAS, it is neither in the United States interest nor in Alaska's interest to delay the project while the question of the Corps of Engineers' legal authority to require such a disclaimer is being resolved;

WHEREAS, this disclaimer is entered without prejudice to Alaska's right to file an appropriate action to determine whether the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit;

WHEREAS, this disclaimer is fully effective and binding upon the State of Alaska, but becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction that the Corps of Engineers does not have of the legal authority to require such a disclaimer prior to issuing the kind of permit; and

WHEREAS, it is the intent of both the United States and Alaska that this disclaimer's objections of the Corps of Engineers, the Solicitor of the Department of the Interior, and other agencies to issuance of the permit for replenishment project thereby allowing replenishment to proceed, while at the same time preserving both the United States' legitimate interest is not having Alaska's coast line extended if the Corps of Engineers has the legal authority require such a disclaimer prior to issuing such a permit and

Alaska's interest in not being bound by such a disclaimer if the Corps of Engineers does not have such legal authority;

THEREFORE, the State of Alaska, acting by and through the Commissioner of Natural Resources, pursuant to the authority granted to the commissioner by art. VIII, sec. 1 of the Alaska Constitution, AS 38.05.020(b), AS 38.05.027(a), AS 38.05.035(a)(14), and AS 38.05.0315(a), declares and agrees as follows:

1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the replenishment projects at Wainwright denied by the North Slope Borough. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the replenishment extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Corps of Engineers and maintains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coastline, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. This disclaimer is entered without prejudice to Alaska's right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

4. This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action, including U.S. v. Alaska, No. 118 original, that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

This disclaimer is dated this 23rd day of October, 1991 at Juneau Alaska.

STATE OF ALASKA

*Harold C. Heinze*  
HAROLD HEINZE,  
Commissioner  
Department of Natural  
Resources

Approved this 25th day of October, 1991 at Juneau, Alaska.

CHARLES E. COLE  
ATTORNEY GENERAL

*Deborah E. Behr*  
By: Deborah Behr  
Assistant Attorney General  
and Regulations Attorney for Alaska

17. Barrow/Browerville, Alaska

a. Disclaimer 10-23-91

b. Corps Permit Pending



## DISCLAIMER

WHEREAS, the North Slope Borough ("North Slope") has applied to the United States Army Corps of Engineers for a permit to dredge approximately offshore fill material from the seabed for discharge fill onto beach areas at Barrow and Browerville, Alaska;

WHEREAS, the project for which the North Slope is seeking the Corps of Engineers' permit is necessary to prevent erosion of the coastal beaches in the areas;

WHEREAS, the State of Alaska believes that the project will benefit the public interest criteria in 33 C.F.R. § 320.4(a), and that the permit for the project should be issued by the Corps of Engineers;

WHEREAS, The Corps of Engineers that, the Solicitor of the Department of the Interior requested "prior to any approval of the proposed construction," the Corps of Engineers obtain a disclaimer from Alaska agreeing that the proposed work will not affect the delimitation of the coastline (see attached letter dated June 21, 1991);

WHEREAS, based on the letter from the Office of the Solicitor, the Corps of Engineers also has requested such a disclaimer and stated the permit application will not be processed until the disclaimer provided (see attached letter dated July 15, 1991);

WHEREAS, under the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., construction of such a facility might affect the location of the coast line boundary of the State of Alaska, including the offshore boundary between the outer continental shelf and state owned lands beneath navigable water;

WHEREAS, under 33 C.F.R. § 320.4(f), the Corps of Engineers is required to consult with the United States Attorney General and the Solicitor of the Department of Interior if a project for which a permit is sought might affect the coast line;

WHEREAS, the Corps of Engineers has determined that it will not process the application if the North Slope thereby prevents issuance of a permit because of the Solicitor's objections on this ground;

WHEREAS, the Solicitor's objections to the permit application would be removed if a disclaimer is entered by the State of Alaska to the effect that Alaska agrees the project will not affect Alaska's coastline under the Submerged Lands Act 43 U.S.C. §§ 1301-1315 (see letter of Solicitor dated June 21, 1991);

WHEREAS, the Corps of Engineers' objection to the permit application would be removed if a disclaimer is whereby State of Alaska agrees that the proposed works would not affect the delimitation of the coastline, thereby affecting the territorial sea;

WHEREAS, the Alaska Attorney General, in a formal opinion dated October 29, 1980, concluded that the Alaska Commissioner of Natural Resources has the power to issue such a disclaimer;

WHEREAS, Alaska would enter such a disclaimer without objection if the Corps of Engineers has the legal authority to require the state to enter such disclaimer before issuing such a permit;

WHEREAS, Alaska and the United States disagree as to whether the Corps of Engineers has the legal authority to require the state to enter such a disclaimer before issuing such a permit;

WHEREAS, the Corps of Engineers' authority to require such disclaimers is at issue in U.S. v. Alaska, No. 118, original in the U.S. Supreme Court, October 1991 term.

WHEREAS, Alaska would not enter such a disclaimer but for the Corps of Engineers' determination that it will not act on the application and issue the permit unless such a disclaimer is entered, thereby removing the Solicitor's objections to issuance of the permit;

WHEREAS, it is neither in the United States interest nor in Alaska's interest to delay the project while the question of the Corps of Engineers' legal authority to require such a disclaimer is being resolved;

WHEREAS, this disclaimer is entered without prejudice to Alaska's right to file an appropriate action to determine whether the Corps of Engineers has the legal authority to require such a disclaimer prior to issuing such a permit;

WHEREAS, this disclaimer is fully effective and binding upon the State of Alaska, but becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction that the Corps of Engineers does not have of the legal authority to require such a disclaimer prior to issuing the kind of permit; and

WHEREAS, it is the intent of both the United States and Alaska that this disclaimer's objections of the Corps of Engineers, the Solicitor of the Department of the Interior, and other agencies to issuance of the permit for replenishment project thereby allowing

replenishment to proceed, while at the same time preserving both the United States' legitimate interest is not having Alaska's coast line extended if the Corps of Engineers has the legal authority require such a disclaimer prior to issuing such a permit and Alaska's interest in not being bound by such a disclaimer if the Corps of Engineers does not have such legal authority;

THEREFORE, the State of Alaska, acting by and through the Commissioner of Natural Resources, pursuant to the authority granted to the commissioner by art. VIII, sec. 1 of the Alaska Constitution, AS 38.05.020(b), AS 38.05.027(a), AS 38.05.035(a)(14), and AS 38.05.0315(a), declares and agrees as follows:

1. Subject to paragraph 4 below, the State of Alaska agrees that the coast line and the boundaries of the State of Alaska are not to be deemed to be in any way affected by the replenishment projects at Barrow and Browerville denied by the North Slope Borough. This document should be construed as a binding disclaimer by the State of Alaska to the effect that the state does not, and will not, treat the replenishment extending its coast line for purposes of the Submerged Lands Act, again subject to paragraph 4 below.

2. This disclaimer is executed solely for the purpose of complying with the conditions recommended by the Solicitor of the Department of the Interior and the Corps of Engineers and maintains the status quo of the baseline and the state-federal boundary. It does not affect property or claims to which Alaska is now entitled. It is not an admission by the State of Alaska or by the United States as to the present location of the shoreline, coastline, or the boundaries of the State of Alaska, and is without prejudice to any contention that any party may now or hereafter make regarding such present location.

3. This disclaimer is entered without prejudice to Alaska's right to file an appropriate action leading to a determination whether the Corps of Engineers has the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

4. This disclaimer becomes ineffective and without force and effect upon a final determination by a court of competent jurisdiction in any appropriate action, including U.S. v. Alaska, No. 118 original, that the Corps of Engineers does not have the legal authority to require such a disclaimer before issuing a permit for a project which might affect the coast line.

This disclaimer is dated this 23rd day of October, 1991 at Juneau Alaska.

STATE OF ALASKA

*Harold C. Heinze*  
HAROLD HEINZE,  
Commissioner  
Department of Natural  
Resources

Approved this 25th day of October, 1991 at Juneau, Alaska.

CHARLES E. COLE  
ATTORNEY GENERAL

By:

*Deborah Behr*  
Deborah Behr  
Assistant Attorney General  
and Regulations Attorney for Alaska